Volume 45, Number 7
April 3, 2019

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: After reviewing data from FOIA.gov, Brent Scher, a staff writer for the Washington Free Beacon, has highlighted the explosion in FOIA requests filed by the media. After analyzing the data from 2013-2018, Scher found that the New York Times had made 100 FOIA requests since the beginning of the Trump administration, compared with 13 requests submitted during the entire second Obama administration. The Washington Post filed one FOIA request during Obama's second term compared with 43 requests since Trump took office. POLITICO filed 198 FOIA requests since the beginning of the Trump administration compared with 15 requests in the second Obama administration. While reporters like Jason Leopold pioneered the more aggressive use of FOIA as a reporting tool during the Obama administration, the increase in media requests during the Trump administration likely reflects the lack of reliable sources at government agencies willing to make information available to reporters by alternative, non-FOIA means.

Court Faults Agency's Choices on Categories of Agency Records

In finding that the FDA had improperly classified a number of records as non-responsive to a voluminous request from the Judge Rotenberng Educational Center pertaining to electrical simulation devices JRC used to treat aggressive behavior, Judge Beryl Howell has identified serious problems with the developing interpretation of what constitutes a record in the aftermath of the D.C. Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the D.C. Circuit ruled that agencies could not withhold records based on their conclusion that they were non-responsive to the request, but instead had to cite an applicable exemption. But because the *AILA* ruling came in the context of the agency's redactions of personally-identifying information about immigration judges based on its conclusion that even though not exempt, some records were not specifically responsive to the parameters of AILA's request, the D.C. Circuit suggested ways in which records could be recategorized so that non-responsive records would not need to be reviewed in the first place.

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JRC's four FOIA requests were prompted by the 2016 decision by the FDA to propose a ban of the Graduated Electronic Decelerator, an electrical stimulation device used by JRC. The agency searched four components – the Office of the Chief Counsel, the New England District Office, the Center for Devices and Radiological Health, and the Office of Regulatory Affairs. The FDA's FOI Division disclosed roughly 10,000 pages of redacted records. OCC independently disclosed 2,800 pages with redactions, the New England District Office disclosed 10,205 redacted pages, and ORA disclosed 382 redacted pages. Two other components of the Department of Health and Human Services outside the FDA disclosed redacted records as well. The Office of the Secretary provided 756 pages, while the Administration for Community Services disclosed an additional 485 pages with redactions. In total, HHS and FDA, excluding CDRH, produced 24,241 pages. Of those pages, approximately 12,642 pages were redacted in full and another 1,340 pages were redacted in part. Although CDRH had located 60,000 responsive records, it had not yet processed any of them for disclosure. The FDA ultimately provided a 1,979-page *Vaughn* index explaining its withholding claims made under Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(C) (invasion of privacy concerning law enforcement records).

Because of the *AILA* holding, the agency had recast 51 documents as being non-responsive because they were distinct enough to constitute a separate record. Howell noted that "the defendants' shift – now claiming to have withheld only non-responsive records – puts a spotlight on a variation of the question of what constitutes an 'agency record' under FOIA that has become particularly relevant since *AILA*: when must information be grouped into a single 'agency record' and when can information be separated into multiple 'agency records'?" Howell explained that "in practice, agencies 'define a "record" when they undertake the process of identifying records that are responsive to a request,' since defining the universe of responsive records is the first step an agency should take in response to a FOIA request." She pointed out that the Justice Department's Office of Information Policy had instructed agencies to use the definition of a record from the Privacy Act, noting that "thus, each 'item, collection, or grouping of information' on the topic of the request can be considered a distinct 'record.'"

But here, Howell observed, "the defendants' withholding of non-responsive information in this case suffers a more fundamental problem: midway through litigation the defendants reclassified collections of information that had been treated as one agency record as multiple agency records." She pointed out that "although the question here is not whether information qualifies as an agency record in the first place, but rather about where one record ends and another begins, the admonition against record manipulation is no less applicable. Allowing the defendants to re-define the contours of a given record midway through litigation would invert the ordinary process of responding to a FOIA request, in which the first step is identifying the responsive records, just because the agency realized that, without the change, certain information would be subject to disclosure. That is precisely the sort of manipulation that undermines the purpose of FOIA."

Howell found the agency's recharacterization of records troubling. She particularly faulted the agency for splitting emails from their attachments on the basis that they were now separate records. She pointed out that "while emails and their attachments are not *per se* a single record, at minimum 'attachments should reasonably be considered part and parcel of the email by which they were sent' when the email 'makes explicit reference to, or includes discussion of, the missing attachments.'" She observed that "ubiquitous email practices suggest that agencies will struggle to justify separating an email and its attachments into multiple records. Of course, from time to time emails are sent with the wrong attachment, but in the ordinary course an attachment is included with the email because it relates to the body of the email. Though not a *per se* rule, ordinary practice leaves very little wiggle room in generally requiring an email with attachments to be kept together as a single record." She concluded that "defendants need not be given the chance to explain why some emails and attachments should be considered as distinct records because reclassifying records midway through litigation is improper."

Howell found the agency's deliberative process privilege claims often lacked any explanation as to why records were predecisional. She pointed out that "the defendants' effort to define the deliberate process so broadly is rejected because the withheld records may in fact pertain to a litany of subsidiary decisions that defendants fail to acknowledge." She added that "without the defendants acknowledging these subsidiary decisions or tying records to those specific decisionmaking processes, the Court cannot be sure that a record related to 'agency action' or 'agency work on particular topics' is in fact predecisional." The agency also claimed it was too burdensome to identify individuals in the decisionmaking process. But Howell observed that "marking, for example, a document as from a subordinate to a superior, from a superior to a subordinate, or as from peer to peer would communicate the needed information about the respective position in the chain of command." However, she agreed with the agency that drafts did not lose their predecisional nature if they were never adopted as agency policy.

Turning to Exemption 6, Howell found that the agency had failed to take into account the effect of public statements made by some JRC patients suggesting that their personal privacy interests had been diminished to some extent and that the public interest in disclosure of personally-identifying information of such individuals was increased somewhat as well. She pointed out that "the public interest in the identity of those people, given their role in the Proposed Ban, might be stronger than the interest in the identity of another JRC patient. While the Court is sensitive to the defendants' burden, this is what the law requires." (*Judge Rotenberng Educational Center, Inc., et al. v. U.S. Food and Drug Administration, et al.*, Civil Action No. 17-2092 (BAH), U.S. District Court for the District of Columbia, Mar. 21)

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 properly concluded that an answer key created by Levitan and Associates, an independent consultant hired by the state to assist in evaluating and understanding proposals submitted for clean energy projects in Connecticut, Massachusetts, and Rhode Island, constitutes a trade secret for purposes of the confidential business information exemption in the Connecticut Freedom of Information Act. After a series of proposals were reviewed and accepted, Thomas Melone, on behalf of Allco Renewable Energy Limited, made a FOIA request for proposals submitted by four companies. The Department of Energy and Environmental Protection denied the request, claiming the confidential business information exemption. Melone filed a complaint with the FOI Commission. At the hearing before the FOI Commission, the department disclosed records for which no exemption was claimed. Melone narrowed his request to proposals submitted by two companies and the Levitan answer key. The department argued that the Levitan answer key was the product of a $330,000 contract and that its disclosure would allow bidders to unfairly adjust their proposals. The FOI Commission agreed that the Levitan answer key qualified as a trade secret. It also upheld the department's partial disclosure of the two companies' proposals. Melone filed suit, limiting his appeal to the Levitan answer key. In court, the department expressed concern that "if the Levitan answer key was released, bidders would have access to a level of detail about the department's analysis that would allow bidders to shape future proposals to obtain higher scores without a commensurate increase in value to ratepayers." The court agreed with the department's concerns, noting that the answer key "is a

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compilation of information that includes confidential and commercially sensitive information, received from others and as well as information developed by the department itself concerning the viability, the costs, and the benefits of proposed projects." Melone argued that the Levitan answer key had no independent economic value. However, the court disagreed, pointing out that "the question here is whether the resources expended on developing the information at issue, the value of the resulting projects to ratepayers, and the value of the information to businesses in a highly competitive market can properly be deemed to be substantial evidence of the economic value of the information to the department. The court concludes that the answer is yes, such evidence provides a substantial basis for the commission's finding that the information at issue has independent economic value derived from its secrecy." (*Allco Renewable Energy Limited and Thomas Melone v. Freedom of Information Commission, et al.*, No. HHB-CV-18-6043138-S, Connecticut Superior Court for the Judicial District of New Britain, Mar. 18)

Illinois

A court of appeals has ruled that the City of Joliet properly withheld videotaped interviews conducted by the Joliet police of four murder suspects in 2013 from reporter Joseph Hosey. The agency claimed that the videotaped interviews were protected by the Illinois FOIA's privacy exemption. Hosey filed a complaint with the Attorney General, which upheld Hosey's complaint because the City had not provided the videotapes for review. However, the City did not disclose the tapes and Hosey filed suit. The trial court sided with the City. Although it found the City had not supported its claim that the videotapes were protected by the privacy exemption, the trial court concluded that a section of the Criminal Code prohibiting disclosure of videotaped interviews with accused suspects applied. Hosey then appealed, arguing that the prohibition on disclosure of videotaped interviews of accused subjects expired once they were no longer suspects. The appeals court upheld the trial court's conclusion. The appeals court noted that "based on the clear language of [the section], the Criminal Code prohibits the transmission of *any* electronic recording of *any* statement made by an accused during a custodial interrogation that is compiled by any law enforcement. Here, the defendants, who were accused at the time the police conducted a custodial interrogation, made videotaped statements to the police that were compiled by the Joliet Police Department. To accept Hosey's interpretation that [the section] is no longer applicable when the defendants are no longer accused would read into it an element that the legislature did not include – specifically that the videotape loses its confidential and exempt status upon conviction or exoneration of the accused." The court added that "the right to so modify a statute belongs to the legislature, not the courts." (*Joseph Hosey v. City of Joliet*, No. 3-18-0118, Illinois Appellate Court, Third District, Mar. 6)

Louisiana

A court of appeals has ruled that memoranda created by the chief investigator for the District Attorney of Jefferson Parish is privileged because there is still a possibility of litigation stemming from Frank Kang's request to have the district attorney support his petition to have his second-degree murder conviction reduced to manslaughter. Sixteen years after he was convicted on charges of second-degree murder, Kang petitioned to have the charges reduced to manslaughter. The chief investigator for the district attorney re-interviewed witnesses while investigating Kang's claim of actual innocence. The investigator then wrote memos to his superiors. Avery Pardee, Kang's attorney, then filed a public records act request for the district attorney's records. The memos were withheld as privileged because they had been prepared in anticipation for possible future litigation. Pardee appealed, arguing that no further proceedings were likely. The appeals court disagreed, noting that "we find that Mr. Kang's request to vacate his conviction and sentence and allow him to plead guilty to a lesser offense may result in future criminal litigation, i.e., his criminal case could potentially be re-opened. Further, as noted by the trial court, the requested records were created solely to investigate

Kang's actual innocence, which may result in the re-opening of the case against him." (*Avery Pardee v. Paul Connick*, No. 18-CA-718, Louisiana Court of Appeal, Fifth Circuit, Mar. 15)

Michigan

A court of appeals has ruled that the Ann Arbor Police Department properly redacted personal information from two hate-crime complaints against Muslim women that the police had investigated and concluded were fabricated in response to requests from reporter Deborah Schlussel. In response to her FOIA request, the police department disclosed a lightly redacted false complaint made by a non-Muslim woman and a more heavily redacted false complaint made by a Muslim woman. Both police reports indicated that they had been referred to the Washtenaw County Prosecutor's Office with a request to prosecute, but that only one woman was prosecuted. Schlussel filed suit and the trial court, after reviewing the complaints *in camera*, ruled in favor of the police department. Schlussel then appealed. The court of appeals explained that under the privacy exemption a court had to determine if the records were of a personal nature and then, if disclosure would constitute an invasion of privacy. The appeals court found Schlussel had not shown any public interest in disclosure that would outweigh the individuals' privacy interest. The appeals court pointed out that "disclosure of the redacted information would add nothing to the public's understanding of the AAPD's investigation. Through the disclosure of the redacted police report, plaintiff has already discovered all of the available information about the AAPD's investigation of the complainant." Rejecting Schlussel's allegation of preferential treatment, the appeals court noted that "the exercise of prosecutorial discretion is a function that the AAPD has no responsibility or authority to do. The AAPD cannot provide any further information regarding possible preferential treatment because it did not make the decision to refrain from prosecuting the complainant." (*Deborah K. Schlussel v. City of Ann Arbor*, No. 341202, Michigan Court of Appeals, Mar. 26)

New York

A court of appeals has ruled that the trial court erred when it ordered the Department of Transportation to disclose emails requested by Adam Gilbert, whose lease of land for a gas station was revoked after the department discovered he had paid fines for violating the minimum wage and overtime provisions of the Federal Fair Labor Standards Act and for price-gouging in the wake of Hurricane Sandy. Gilbert made two separate FOIL requests for records concerning communications from New York County and the Office of the Governor pertaining to the decision to terminate the lease. The agencies claimed that many of the records were privileged, but the trial court ruled partially in Gilbert's favor. On appeal, the appellate court agreed that the records were privileged. The appeals court noted that "inasmuch as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged." The appeals court observed that "each of the emails at issue are communications between counsel in the Governor's Office and DOT employees that contain or reference factual information relevant to counsel providing legal advice regarding the proposed termination of the sublease. Accordingly, we conclude that the emails are protected by the attorney-client privilege and, therefore, [the trial court] erred in ordering their disclosure." (*In the Matter of Adam B. Gilbert v. Office of the Governor, et al.*, No. 526678, New York Supreme Court, Appellate Division, Mar. 21)

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The Federal Courts…

Judge Emmet Sullivan has become the second district court judge in the D.C. Circuit to reject an agency's **Exemption 5 (privileges)** claims because the agency had not shown that it considered whether or not disclosure would cause foreseeable harm under the standard added by the 2016 amendments. In a case brought by Judicial Watch against the National Oceanic and Atmospheric Administration for communications between Thomas Karl, a NOAA scientist, and John Holden, who served as director of the Office of Science and Technology Policy during the Obama administration, the agency disclosed 900 pages of emails, a large portion of which were partially redacted under Exemption 5. By the time Sullivan ruled, Judicial Watch was contesting only 48 pages. Judicial Watch argued that NOAA had failed to show the existence of any foreseeable harm from disclosing the disputed pages. Sullivan pointed out that Judge Amit Mehta was the only other D.C. Circuit district court judge to consider the foreseeable harm standard in *Rosenberg v. Dept of Defense*, 342 F. Supp. 3d 62 (D.D.C. 2018). Sullivan observed that in *Rosenberg* Mehta had found that the agency "had failed to explain how the disclosures of information withheld under Exemption 5 would harm the agency's deliberative process. The court noted that the foreseeable harm requirement does not go 'so far as to require the government to identify harm likely to result from disclosure of *each* of its Exemption 5 withholdings' but the government at least needed to do more than 'perfunctorily state that disclosure of all the withheld information – regardless of category or substance – would jeopardize the free exchange of information.'" Finding *Rosenberg* persuasive, Sullivan noted that "the text and purpose of the Act both support a heightened standard for an agency's withholdings under Exemption 5. The text of the Act states an agency may only withhold information if 'the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption.' In other words, even if an exemption applies, an agency must release the document unless doing so would reasonably harm an exemption-protected interest. The purpose of the [2016 amendments were] to establish a 'presumption of openness,' and its passing was based on the recognition that 'from the beginning, agencies have taken advantage of these exemptions to withhold any information that might technically fit.' To that end, Congress sought to require an agency to 'first determine whether [it] could reasonably foresee an actual harm' before the agency claims an exemption. Furthermore, an 'inquiry into whether an agency has reasonably foreseen a specific, identifiable har that would be caused by a disclosure would require the ability to articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.'" NOAA had submitted two affidavits supporting its use of Exemption 5 by telling Sullivan that disclosure would chill candid discussions. Sullivan noted that "these general explanations of the possibility of a 'chilling effect' fall short of articulating 'a link between the specified harm and specific information contained in the material withheld.'" He observed that "if the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption." Sullivan explained that "however, in enacting the legislation, Congress intended that the technical application of an exemption was not sufficient without a showing that disclosure also harmed an interest the exemption sought to protect in the first place." He observed that "the question is not whether disclosure could chill speech, but rather if it is reasonably foreseeable that it will chill speech and, if so, what is the link between this harm and the specific information contained in the material withheld." Sullivan told the agency it could provide supplemental affidavits to attempt to satisfy the foreseeable harm standard. (*Judicial Watch, Inc. v. U.S. Department of Commerce*, Civil Action No. 17-1283 (EGS), U.S. District Court for the District of Columbia, Mar. 22)

A federal court in New York has ruled that U.S Central Command properly withheld personally identifying information contained in records pertaining to attacks on American servicemembers in Iraq from 2004 to 2011 requested by Osen LLC, a law firm representing U.S. servicemembers killed or injured in Iraq

under **Exemption 6 (invasion of privacy)** but that the agency has not shown that its remaining claims made under **Exemption 1 (national security)** are still valid because much of the information had been publicly acknowledged in separate disclosures by U.S. Army Central. Osen submitted its FOIA requests to obtain information relevant to its suits against Iran for damages to its clients. The agency disclosed 7,749 pages and Osen challenged redactions on approximately 900 pages. Judge Katherine Failla's ruling focused on photographs of damage caused to vehicles as the result of explosively formed penetrators, a type of improvised explosive device. The records contained five categories of information that had been withheld. Four categories, including EFP size, had been withheld under Exemption 1 while the fifth category had been withheld under Exemption 6. Failla agreed with Osen that information about EFP size was no longer classified because the same information had been publicly disclosed. She noted that 'in the absence of further explanation for why these redactions are substantively different than the material already disclosed, the Court determines that CENTCOM has officially disclosed the material on EFP size." She observed that "the EFP size revealed in the majority of pages through official FOIA disclosures is 'as specific' as the prior disclosures. CENTCOM does not attempt to explain why the information that has been withheld poses risks that the disclosed material did not, nor does it offer an explanation for why prior disclosures in this area were mistakes." Failla also agreed with Osen that even if CENTCOM had not disclosed the photos, ARCENT had. She pointed out that "while CENTCOM and ARCENT contain separate FOIA staffs, neither is an independent agency. Both are DoD components. Considering that 'disclosure, not secrecy, is the dominant objective of the Act,' the Court does not consider it appropriate to limit a waiver of Exemption 1 to subcomponents of the same agency. . . The Court holds that a waiver of an exemption by ARCENT applies to other components of DoD, including CENTCOM." Osen argued that there was a public interest in disclosure of personally identifying information about the terrorists involved in the attacks. Failla rejected that claim, noting that "these individuals may indeed be responsible for serious crimes or attacks against U.S. forces, but their involvement remains unproven and is ultimately irrelevant to the determination of this Court. Therefore, the Court refrains from characterizing them in the manner described by Plaintiff. . .[T]he absence of any information demonstrating that any withheld names belong to 'terrorists' weakens Plaintiff's claims to disclosure." (*Osen LLC v. United States Central Command*, Civil Action No. 17-4457 (KPF), U.S. District Court for the Southern District of New York, Mar. 22)

A federal court in California has ruled that intelligence agencies properly invoked a ***Glomar* response** neither confirming nor denying the existence of records in response to FOIA requests from journalist Kevin Poulsen for records pertaining to alleged electronic surveillance of Donald Trump during the 2016 election campaign. In his requests, Poulsen referenced a series of tweets Trump made after he became President in which he criticized the agencies' behavior, as well as several congressional statements alleging such surveillance and court documents, arguing that they constituted public acknowledgment of the surveillance. By the time Poulsen filed suit, all the agencies had either issued a *Glomar* response or had not yet responded at all. Poulsen argued that the D.C. Circuit's decision in *ACLU v. CIA*, 710 F. 3d 422 (D.C. Cir. 2013), had fundamentally changed the public acknowledgement test by allowing a presumption favoring the existence of records in cases where an agency could not plausibly maintain that it had no records, modifying the test from *Fitzgibbon v. CIA*, 911 F. 2d 755 (D.C. Cir. 1990), requiring that the information be as specific as the information previously released, match the information previously disclosed, and that the information previously disclosed was made through an official and documented disclosure. However, Judge William Orrick noted that he agreed with the government that the *ACLU v. CIA* decision "did not fundamentally alter the test to determine whether an 'official acknowledgment precludes the assertion of a *Glomar* response or the application of the *Fitzgibbon* factors. Indeed, in cases following *ACLU*, the D.C. Circuit has continued to apply the *Fitzgibbon* factors in the *Glomar* context." Orrick explained that "the President's very general tweets and comments do not disclose the existence of specific documents sought in Poulsen's Requests. There

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is no disclosure establishing that any of the specific documents sought by Poulsen *exists*, much less a match between the disclosure and the specific electronic surveillance information sought by Poulsen." Orrick also rejected Poulsen's claim that congressional or court disclosures constituted official acknowledgment. He pointed out "viewed together, the statements and disclosures identified by Poulsen do not create an official acknowledgement." He added that "those assertions are based, at best, on assumptions. A party's assumptions cannot be used to preclude a *Glomar* response." Orrick then assessed the agencies' **Exemption 1 (national security)** and **Exemption 3 (other statutes)** claims as the basis of their *Glomar* responses. Orrick concluded that "the Agencies have shown – particularly in respect to the acknowledged existence if an ongoing investigation – that harms would result from requiring them to provide any substantive response and that those harms are protected by both Exemptions 1 and 3." (*Kevin Poulsen v. Department of Defense, et al.*, Civil Action No. 17-03531-WHO, U.S. District Court for the Northern District of California, Mar. 22)

Judge Randolph Moss has ruled that American Oversight is both eligible and entitled to **attorney's fees** in its FOIA litigation against the Department of Justice for disclosure of records concerning former Attorney General Jeff Sessions' unreported contacts with Russian officials in connection with his security clearance and contacts between the FBI and former White House Chief of Staff Reince Priebus regarding press reports of contacts between Russian nationals and individuals associated with the Trump campaign but reduced American Oversight's fee request by a third because of the relative simplicity of the litigation. American Oversight had requested expedited processing, which was granted, and by the time the parties appeared before Moss, the primary issue for resolution was to set a disclosure schedule. Moss accepted the FBI's proposed schedule and ordered the agency to comply with it. Despite some disputes between the parties, the FBI disclosed Sessions' security clearance records, including a discretionary release, and provided 239 pages with redactions in response to the Priebus request. American Oversight then filed a motion for $24,092 in attorney's fees, $8,252 for litigating the fee request, and $475 in costs. Justice argued that American Oversight was not eligible for fees since the FBI was already processing its request when American Oversight filed suit and would have disclosed the records without the need for litigation. Moss pointed out that "nothing in the [FBI's] declaration suggests that the FBI planned to produce the relevant records on the same timeline as the one adopted by the Court, absent this litigation. But, more importantly, Plaintiff could still satisfy the judicial-order requirements by showing that the Court issued an order adopting an existing production schedule." Moss noted that "because the Court required the FBI to produce non-exempt documents relevant to both the Sessions request and the Priebus request by set dates, the Court concludes that Plaintiff 'obtained relief through. . . a judicial order' and American Oversight is, accordingly, eligible for an award of attorney's fees." Having determined that American Oversight was eligible for fees, Moss turned to an examination of whether or not the organization was entitled to the fees requested. The FBI contended that the Priebus request was not in the public interest because it did not produce any evidence that the FBI responded to Priebus's query. Moss noted that "Defendants do not dispute that the topic was one that might have been of public interest. But they note that American Oversight's FOIA request failed to yield any records of public interest." He added that "American Oversight sought to confirm the accuracy of that statement, and the fact that it found no contrary evidence was itself of public value." Finding no evidence that American Oversight had made its requests because of any commercial or personal interest, Moss found those two factors did not apply. As to the reasonableness of the agency's position, Moss pointed out that because the FBI had granted expedited processing, the focus was whether or not the agency's delay was justified. He found that here the reasonableness factor did not weigh in favor of either party. However, Moss indicated that American Oversight's fee request was excessive. He noted that he was unpersuaded "that attorneys' fees of almost $20,000 for attending three status conferences and conferring with opposing counsel is reasonable." He pointed out that "extensive preparation is, of course, a good thing. But Defendants should not be required to foot the bill for preparation above and beyond what was reasonably necessary." Moss found the same problem applied to American Oversight's request for "fees-on-fees" for litigating the fee award issue, reducing

that amount by a third as well because of overstaffing. As a result, Moss reduced the fee award to $16,061 in attorneys' fees and $5,501 for litigating the fee award issue. (*American Oversight v. U.S. Department of Justice and Federal Bureau of Investigation*, Civil Action No. 17-727 (RDM), U.S. District Court for the District of Columbia, Mar. 25)

A federal court in Texas has ruled that the IRS conducted an **adequate search** for records related to a Chief Counsel Advice that was issued by the IRS to Highland Capital Management and that the agency properly withheld the majority of records because their public availability was specifically determined by § 6110(a) as well as **Exemption 3 (other statutes)** but ordered an *in camera* inspection of some of its exemption claims made under **Exemption 5 (privileges)** after finding that the agency had failed to sufficiently justify its invocation of the exemption. The agency's initial search located 76 responsive pages. A subsequent search located another 283 pages and 11 pages of responsive emails were also found. The agency withheld most of the records under § 6110(a). Highland argued that the agency's search was inadequate because it had required multiple searches. The court, however, disagreed, noting that "the fact that the IRS conducted multiple searches indicates that the IRS was complying with its FOIA obligations in good faith. Ultimately, because the court concludes that the IRS's 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 it conducted an adequate search." The court approved the agency's use of § 6110(a) which provides that "the text of any written determination and background file document relating to such written determinations shall be open to public inspection at such place as the Secretary may by regulations proscribe." The court pointed out that "the term 'written determination' as used in the statute includes Chief Counsel Advice" as well as records related to such advice." The court explained that "as such, it is section 6110 – not the FOIA – that exclusively provides Highland with the means to obtain these records." The court added that "since Highland's complaint did not state a claim seeking relief under section 6110, the Court concludes that it lacks jurisdiction to compel the IRS to produce these withheld documents. Moreover, even if the court had jurisdiction, this court would not be the proper venue for an action under 26 U.S.C. § 6110," which establishes that such an action must be brought in the Tax Court or the District Court for the District of Columbia. The IRS had also cited § 6103 as an Exemption 3 statute. Although Highland argued the agency had not provided sufficient detail to support its Exemption 3 claims, the court noted that "it appears logical that emails between Chief Counsel Attorneys, collected with respect to the possible existence of liability for taxpayers other than Highland, would necessarily have third party tax information that should be withheld in part." The court found the agency's affidavits did not support its invocation of the attorney-client privilege and the deliberative process privilege. Finding that the agency had shown that the records it claimed were exempt under the deliberative process privilege were predecisional, the court observed that the agency had yet failed to show that they were deliberative. The court pointed out that "the IRS's declarations offer the court nothing more than opaque explanations as to how the withheld records contributed to the agency's deliberations, such as statements that the withheld records contain 'thoughts and rationale that may not have been reflected in the published CCA' or 'the deliberations of employees of the [IRS] or their counsel.' Precedent makes clear that the IRS must do more to establish that the deliberative process privilege applies to the withheld records." (*Highland Capital Management, LP v. Internal Revenue Service*, Civil Action No. 17-2906-G, U.S. District Court for the Northern District of Texas, Mar. 15)

Judge Tanya Chutkan has ruled that the FBI has resolved her previous concerns about three documents withheld from Nancy Crisman under **Exemption 5 (privileges)** by disclosing two of them after deciding that there would be no foreseeable harm from disclosure and by sufficiently explaining that redactions in the third document were appropriate under the deliberative process privilege. Crisman lost her job as a corporate nurse

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working at the Federal Reserve because the FBI mistakenly recorded a document it received from the Financial Institution Security Association as pertaining to the Foreign Intelligence Surveillance Act. Crisman filed a FOIA/Privacy Act request with the FBI for records about herself. By the time Chutkan resolved the case, the FBI was still withholding parts of three documents under Exemption 5. Chutkan noted that "the FBI conducted an additional review of the documents over which it was asserting the (b)(5) exemption. The FBI concluded that two of the three documents withheld could be released in full because of the new law, the FOIA Improvement Act, directing agencies to withhold information only if it is reasonably foreseeable that disclosure would harm an interest protected by the exemption." As to the third document, Chutkan pointed out that the agency's further explanations were sufficient to support its deliberative process privilege claim because "it is apparent that the first redaction protects inter-agency communications about an employee's recommendation for handing a Freedom of Information Act/Privacy Act request, and the second redaction relates to intra-agency communications about an employee's advice based on anticipated [Office of Information Policy] responses; both are permissible purposes for asserting the FOIA (b)(5) exemption." (*Nancy Crisman, et al. v. Department of Justice, et al.*, Civil Action No. 12-1871 (TSC), U.S. District Court for the District of Columbia, Mar. 25)

Two recent decisions in **attorney's fees** cases illustrate the vast difference between winning and losing such a motion. A federal court in New York awarded journalist Mattathias Schwartz $546,903 in fees and $10,430 in costs for his successful litigation against the DEA to force the agency to release videotapes taken of a drug raid because they had appeared as part of a television show. Schwartz originally asked for $978,568, so reducing the fee award by nearly half certainly constituted a bargain of sorts for the government. By contrast, a federal court in Georgia rejected Thomas Sikes' request for attorney's fees to cover the costs of representing him on appeal to the Eleventh Circuit. Sikes, representing himself in district court, requested records concerning the Navy's investigation of the suicide of Admiral J.M. Boorda, who at the time of his death was Chief of Naval Operations. The Navy provided some of the records requested, but refused to process a second request, contending it was duplicative. Sikes appealed, where he was represented by counsel, and the Eleventh Circuit ruled that the Navy could not reject a request solely because it was duplicative. On remand, the district court ruled that the Navy had complied with Sikes' request by re-releasing the records. Rejecting Sikes' request for his counsel's appellate fees, the court found that Sikes' victory on the issue of duplication was not a public interest worthy of a fee award. (*Mattathias Schwartz v. United States Drug Enforcement Administration*, Civil Action No. 13-5004 (CBA) (ST), U.S. District Court for the Eastern District of New York, Mar. 21; and *Thomas W. Sikes v. United States Department of the Navy*, Civil Action No. 316-074, U.S. District Court for the Southern District of Georgia, Mar. 21)

A federal court in New York has ruled that the Natural Resources Defense Council does not have **standing** to challenge the recently revised EPA advisory committee rules prohibiting individuals who have EPA research grants from serving on advisory committees because the NRDC has not shown that any of its members have suffered harm as a result of the changes. Citing a recent case involving a challenge to the same policy brought by Physicians for Social Responsibility where Judge Trevor McFadden allowed the organization's suit to continue because several of its members served on EPA advisory committees and were forced to either resign from the advisory committee or lose their EPA funding, the court here found that the NRDC had not shown such harm to any of its members. The court pointed out that "the NRDC's declarations indicate at most that its members lost their professional opportunities or faced the imminent loss of those opportunities in March 2018 after the NRDC commenced this action." The court observed that "importantly, and by way of comparison, at least one plaintiff in *Physicians* had allegedly *already* been removed from an advisory committee when the lawsuit commenced – thus, it is unsurprising that the *Physicians* court did not engage in a lengthy analysis of the existence of an injury-in-fact." The court added that "the NRDC's

allegations that the Directive would hinder its members who hold one benefit from competing for the other establishes only that its alleged injury is sufficiently *concrete*. Whether that harm is sufficiently *imminent* is a separate question." (*Natural Resources Defense Council v. Andrew Wheeler*, Civil Action No. 18-613, U.S. District Court for the Southern District of New York, Mar. 21)

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