Volume 46, Number 1
January 15, 2020

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Court Finds Agency Failed to Show Foreseeable Harm .. 1

Views from the States 3

The Federal Courts 5

Index

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: On the eve of the Senate trial for the House impeachment of President Trump, Sen. Patrick Leahy (D-VT) wrote an editorial for the Rutland Herald comparing the access to government information provided by FOIA with the need of the Senate to have more documentary information to perform its oversight duties stemming from the impeachment. Leahy noted that "FOIA continues to play a critical role in shining light on government misconduct. . .But FOIA is no substitute for the Senate's constitutional duty to pursue the truth and to impartially weigh the impeachment presented to it." He observed that "the Senate's actions in the days and weeks ahead will shape our system of checks and balances for decades to come. FOIA has done its job. Now senators must do theirs."

Court Finds Agency Failed To Show Foreseeable Harm

Ruling in a case brought by the Center for Investigative Reporting for access to contract proposals submitted to U.S. Customs and Border Protection to build a wall on the border between the United States and Mexico, Judge Beryl Howell has provided the first substantive discussion of the effects of the 2019 Supreme Court decision, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), rejecting the substantial harm test developed in *National Parks* and replacing it instead with a customarily confidential standard. Further, in rejecting CBP's Exemption 5 (privileges) claims, she has also explored in much greater detail the meaning of the codification of the foreseeable harm test to all the exemptions in the 2016 FOIA Improvement Act.

In response to CIR's request, CBP located 6.762 pages of potentially responsive records stemming from over 150 submitted proposals. The agency's Office of Acquisition found 990 pages of responsive records and disclosed 946 in full and 44 in part. The Office of Facilities and Asset Management found 101 pages of responsive records, one page of which was released in full, one page was released in part, and 99 pages were withheld entirely. The Office of Information Technology, which had managed the email account for the border wall project, located an additional 5,671 pages of responsive records, 72 pages were released in full,

ACCESS REPORTS

110 pages were released in part, and 5,489 pages were withheld in full. The agency claimed Exemption 4 (confidential business information), Exemption 5 (privileges), 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). However, CIR only chose to challenge withholdings under Exemption 4 and 5 of 110 pages of emails, and under Exemption 5, 216 pages of documents related to the border wall.

CIR did little to challenge the agency's assertion that the deliberative process privilege applied to many of its Exemption 5 claims, but instead focused on whether the agency had met the foreseeable harm test. Howell noted that "this choice is not surprising. . .[T]he foreseeable-harm requirement is a 'heightened standard' and thus a FOIA requester may perceive a foreseeable-harm argument to be easier to advance than an argument about whether a FOIA exemption applies at the outset." But she pointed out that "focusing exclusively on foreseeable harm, however, risks conflating an agency's failure to establish the basis for an exemption with failure to demonstrate foreseeable harm."

Howell found that the agency had failed to show that the records were deliberative. She noted that "the defendants have failed to identify the final decisions to which the withheld documents pertain." She explained that "some of the document descriptions in the defendants' *Vaughn* Index create the impression that the documents at issue might themselves *be* final subsidiary agency decisions." She then pointed out that "the defendants have made essentially no effort to satisfy the 'key feature' by identifying 'the relation between the author and recipients of the document'" and noted that for other records "the defendants do not identify the author to assess the deliberative nature of the contents." She also faulted the agency's failure to provide any chronology of the decision-making process. She observed that "given that the defendants have not identified the specific final agency decisions to which the documents withheld and redacted pursuant to Exemption 5 relate, they have, by extension, failed to establish that the documents predated those decisions."

Having shown skepticism as to whether the records qualified under the deliberative process privilege, Howell found the agency's foreseeable harm claims suspect as well. Howell noted that the foreseeable harm standard was included in a presidential memorandum issued by former President Barack Obama on his first day in office, which was later implemented in the Holder memorandum. But in 2016 Congress decided to codify the foreseeable harm test. Howell noted Congress was particularly worried about the overuse of Exemption 5. She pointed out that "the text, history, and purpose of the FOIA Improvement Act confirm that the foreseeable-harm requirement was intended to restrict agencies' discretion in withholding documents under FOIA." After reviewing the agency's foreseeable harm claims, she indicated that "the defendants' claims of foreseeable harm consist of 'general explanations' and 'boiler plate language' that do not satisfy the foreseeable-harm requirement." She noted that "if the defendants wish to establish foreseeable harm when they supplement the record, they will need to provide 'context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure.'"

All that remained in dispute under Exemption 4 were a series of question-and-concern emails. CIR agreed that the information was commercial and obtained from a person but challenged whether or not it was confidential. Howell began her discussion by noting that the D.C. Circuit had already applied the customarily confidential standard to voluntarily submitted commercial or financial information in its decision in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). She pointed out that in *Food Marketing*, the Supreme Court "set forth a single test for determining whether information – regardless of whether voluntarily or involuntarily submitted to the government – is confidential under Exemption 4. Specifically, 'commercial or financial information' is confidential for the purpose of Exemption 4 when it is 'both customarily and actually treated as private by its owner' and, perhaps as well, 'provided to the government under an assurance of privacy.'" Howell explained that "the import of *Food Marketing*'s

holding that the ordinary meaning of 'confidential' applies in *all* Exemption 4 cases, then, is clear: *Critical Mass* and its progeny now supply the framework in this Circuit for determining whether voluntarily *and* involuntarily submitted commercial or financial information are 'confidential' under Exemption 4." Howell pointed out that for the government to establish the confidentiality practice of the submitter, it had to show some degree of personal knowledge. She observed that "conclusory statements by an agency official about what the agency official may believe about how a submitter customarily treats the information at issue are simply insufficient." Howell found the agency had failed to support its confidentiality claims. She noted that "the defendants contend only that *unsuccessful* bidders have an interest in keeping their information private. They never claim, however, that unsuccessful bidders submitted the redacted questions and concerns." While the Supreme Court in *Food Marketing* suggested that agency assurances that submitter information would be considered confidential would probably be sufficient to show that the submitter could reasonably expect its information would be held confidential, the Supreme Court left that issue unaddressed. Because the Supreme Court left the issue of assurances unresolved, Howell noted that "suffice it to say that *if* Exemption 4 does so, the defendants must supply at least *some* evidence that this assurance was given."

Howell then found that the foreseeable harm test also applied to Exemption 4. She observed that "to meet this requirement, the defendants must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by the exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests,' and thereby dissuading others from submitting information to the government." (*Center for Investigative Reporting v. U.S. Customs and Border Protection, et al.*, Civil Action No. 18-2901 (BAH), U.S. District Court for the District of Columbia, Dec. 31, 2019)

Views from the States

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

Michigan

A court of appeals has ruled that videos of incidents in which school bus drivers disciplined students constitute exempt student records under the Federal Educational Rights and Privacy Act and that portions of videos that could identify individual students need not be disclosed in response to a FOIA request from the Kalamazoo Transportation Association, the union that represented the bus drivers, for collective bargaining. After the union requested the records, the Kalamazoo Public Schools denied the request, claiming the videos were student records under FERPA as well as the Michigan FOIA's exemption for student records. When the union filed suit, the trial court sided with the school district, finding that because the records qualified as student records, they were completely protected by the state exemption for student records. The court of appeals agreed that the records qualified as student records, but explained that the exemption only covered identifiable student records and the school district had not considered whether portions of the videos that did not contain identifiable student records could be separated and disclosed. The court of appeals noted that "indeed, by its unambiguous terms, the stated exemption purports only to exempt '*information* that, if released, would prevent the public body from complying with' FERPA, not the entire record." The appeals court pointed out that "nothing in FERPA requires nondisclosure once the public agency redacts all 'information directly related to a student' from a particular record. At that point, the record no longer satisfies the definition of an education record under FERPA." The school district argued that even with redaction

individual students would still be identifiable. But, the court of appeals indicated that "this argument, however, was not addressed by the trial court and we decline to address it for the first time on appeal. Accordingly, we remand this case for the trial court to consider the possibility of redaction in the first instance." (*Kalamazoo Transportation Association, MEA/NEA, and Tim Russ v. Kalamazoo Public Schools*, No. 349031, Michigan Court of Appeals, Dec. 17, 2019)

A court of appeals has ruled that the Michigan State Police properly responded to a FOIA request from Michigan Open Carry, Inc. (MOCI) for records concerning open carry permits by providing a series of numbers and directing the organization to its website for further elaboration. Considering the response a denial of its request, MOCI filed an administrative appeal. An agency FOIA appeals officer issued a letter indicating that the request had not been denied and that the information provided was a summary of the information that was in the Department's possession. MOCI then filed suit, arguing that because the agency's appeal letter had not been signed by the agency head, it was not valid. The trial court found that an agency head could properly delegate his or her responsibilities under FOIA and that the State Police had an appropriate regulation delegating such responsibility. However, the trial court also found that although the State Police had misconstrued MOCI's request, to retrieve responsive records would have required the agency to access exempt law enforcement information networks. At the court of appeals , that court rejected Michigan Open Carry's claim as well, noting that nothing in [the statute] prohibits the head of a public body from employing personnel to act on behalf and under the authority of the head of the public agency." The appellate court agreed with the trial court that any further responsive records would be contained in exempt LEIN databases. MOCI argued that the LEIN exemption wasn't part of FOIA. The appeals court, however, noted that "simply put, LEIN information or records are specifically described as exempted from disclosure under [FOIA]. The level of specificity in [the statute] is adequate to fall within the FOIA exemption. Subcategories of LEIN information did not have to be statutorily identified as being exempt before fitting the [appropriate] FOIA exemption." (*Michigan Open Carry, Inc. v. Department of State Police*, No. 348487, Michigan Court of Appeals, Dec. 17, 2019)

Washington

The supreme court has ruled that the San Juan County Code improperly required requesters to file an administrative appeal and receive a decision letter before going to court. Edward Kilduff submitted a Public Records Act request concerning a wetlands classification dispute. Dissatisfied with the County's response, Kilduff filed suit. Because the San Juan County Code required requesters to receive a decision letter before going to court, the trial court ruled that since Kilduff had not filed an administrative appeal, he had failed to exhaust his administrative remedies. In the supreme court, San Juan County argued that requiring requesters to appeal was not a burden to requesters because it allowed them to review the original response and ask for more if necessary. But the supreme court noted that "we reject this reading of the [PRA]. To do otherwise would allow agencies to rewrite the statute so that a failure to produce records is not truly a denial for the purposes of judicial review until a secondary layer of review has occurred. Indeed, it is questionable whether an agency could be held liable for silently withholding records under this reading of the statute." The supreme court agreed with the trial court that Kilduff's quo warranto action filed in the same suit with his PRA action should have dismissed as frivolous. However, the court indicated that the trial court erred when awarding sanctions on Kilduff's attorneys for his quo warranto action since his PRA action had been appropriate. (*Edward Kilduff v. San Juan County*, No. 95937-4, Washington Supreme Court, Dec. 12, 2019)

A court of appeals has ruled that Public Records Act requests filed by Palmer and Patricia Strand with Council 2 of the Washington State Council of County and City Employees because they represented city employees in Spokane was frivolous because the union was not functionally equivalent to a public body for purposes of the PRA. The trial court granted the union's motion to dismiss and sanctioned the Strands $7,440

to cover the union's attorney's fees. The court of appeals agreed that none of the four factors used in determining whether an entity was functionally equivalent to a public body applied here. The appeals court noted that "all [the Strands] could demonstrate was they were seeking information to investigate what they believe was a matter of public concern (whether Assessor's office employees are working on a basis that violates the [collective bargaining agreement] and, given the Union's role representing public employees, the Union should have its own copies of any agreements supplementing the CBA. Neither was a basis for burdening a private union with agency obligations under the PRA." (*Palmer and Patricia Strand v. Council 2 – Washington State Council of County and City Employees, AFSCME, AFL-CIO, et al.*, No. 36233-7-III, Washington Court of Appeals, Division 3, Dec. 12, 2019)

The Federal Courts…

A federal court in Colorado has allowed immigration attorney Jennifer Smith's **pattern or practice** claim against U.S. Immigration and Customs Enforcement to continue and has **enjoined** the agency from categorically applying **Exemption 7(A) (interference with ongoing investigation or proceeding)** to any requests related to individuals the agency has determined are subject to deportation. In response to Smith's requests to U.S. Citizenship and Immigration Services for Alien files for clients who were undocumented, CIS would provide documents but refer other documents to ICE. For several undocumented clients, ICE told Smith that the agency would not process the records under its unwritten but established Fugitive Practice. Smith filed a pattern or practice suit challenging ICE's Fugitive Practice, alleging that she regularly made FOIA requests to the agency for records of undocumented individuals whom ICE might consider fugitives, and that the agency's denial of Smith's administrative appeal applying the policy confirmed that the policy existed. ICE eventually revised its Fugitive Practice to apply only to requests made directly to ICE, rather than referrals from CIS. For records on individuals whom ICE considered subject to deportation, the agency would issue a categorical denial under Exemption 7(A). Such denials were subject to administrative appeal, which could result in some requests being processed. Judge William Martinez found that Smith had standing to pursue her pattern or practice claim. As to whether ICE's Fugitive Practice policy was still in effect after the agency's revisions, Martinez observed that "the gravamen of Smith's complaint is her belief that many of her future FOIA requests will be denied based on ICE's determination of 'fugitive' status and its understanding of its power to withhold responsive records on that account. The [Standard Operating Procedure policy] may disadvantage Smith to a lesser degree than the Fugitive Practice, but it disadvantages here in the same fundamental way." Noting that only the D.C. Circuit and the Ninth Circuit had recognized pattern or practice claims under FOIA, Martinez pointed out that "in the Court's view, a plaintiff seeking to plead a § 552(a)4)(B) cause of action *before* the agency withholds records may do so in the same way that any plaintiff may plead a cause of action in federal court before suffering the relevant injury, namely through the Declaratory Judgment Act." Acknowledging that categorical withholding under Exemption 7(A) could well be appropriate for many of the agency's database records, Martinez nevertheless found that ICE had failed to show that all such records were entitled to such categorical withholding. Martinez then issued a permanent injunction prohibiting ICE from using its SOP on fugitive aliens as the basis for withholding records under FOIA. (*Jennifer M. Smith v. U.S. Immigration and Customs Enforcement*, Civil Action No. 16-2137-WJM-KLM, U.S. District Court for the District of Colorado, Dec. 16, 2019)

Judge Ketanji Brown Jackson has ruled the U.S. Geological Survey properly withheld records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** in response to a FOIA request from the Pavement Coatings Technology Council, a trade organization whose members are involved in the production,

ACCESS REPORTS

distribution, and sale of pavement surface coatings that contain refined tar sealant. PCTC submitted a FOIA request to the U.S. Geological Survey for 12 categories of records concerning its consideration, regulation, and review of coal tar or asphalt sealants. The agency located and disclosed all or portions of 52,000 responsive records. By the time Brown Jackson ruled, the only remaining disputes were over withholdings based on either Exemption 5 or Exemption 6. Brown Jackson noted that "when a plaintiff requests records or documents 'surrounding or leading up to an agency publication, the relevant agency decision' for purposes of determining whether the materials are pre-decisional under FOIA's Exemption 5 is the *decision whether to publish*." PCTC wanted to find out how the agency had conducted its studies so that it could replicate them. Brown Jackson explained that "it appears that PCTC has sought disclosure of the underlying methods that USGS utilized to study tar sealants, as well as the agency's pre-publication findings regarding such sealants, *precisely because* PCTC is interested in discovering and challenging the agency's thought processes leading up to its sealant-related publications. And its records request – which seeks notes, exploratory analysis, working papers or draft reports, and internal or external review of such drafts – thus squarely implicates material that falls within the protective reach of Exemption 5 insofar as it plainly pertaining to 'pre-decisional' scientific research developed in anticipation of publication." Noting that one reason for invoking the deliberative process privilege was to prevent public confusion about agency's decisions, Brown Jackson observed that "if the USGS scientists' notes, drafts, exploratory analyses, and peer review are produced as PCTC requests, there is also a clear risk of unfair attribution of individual scientists' or reviewers' impressions to the agency itself." She pointed out that "the fact that the agency ultimately did not publish a report memorializing all of the underlying research PCTC seeks is of no moment. . .[T]he material plainly reflects the *deliberations* that the agency undertook as part of its decision-making *process*, which is all that the FOIA requires." PCTC argued that disclosure of the scientific data would allow for the free exchange of ideas and allow others to reproduce or verify the work. But Brown Jackson noted that "FOIA's Exemption 5 rests on the opposite assumption – i.e., that disclosure of deliberative information would discourage candid discussions within the agency and would cause scientists to censor their internal discussions, deliberations, and analyses to conform to outside criticism regarding how to conduct or present research on refined tar sealants. Equally importantly, disclosure of deliberative information regarding studies that are not ultimately published – as in the circumstances presented here – could be misused by outside parties and cause public confusion. Such results are manifestly inconsistent with the purposes of Exemption 5." USGS withheld names and addresses of outside scientists under Exemption 6. PCTC argued that the agency could not withhold business-related information. However, Brown Jackson observed that "to the extent that identifying information such as an organization's address can implicate the privacy of individuals, releasing such sensitive information about the organization is functionally the same as releasing similar information about the organization's individual members." Brown Jackson also found that PCTC had not shown any public interest in disclosure. Finding that the privacy interests far outweighed any public interest, she pointed out that "in this case, the volunteers'[who participated in the USGS studies] privacy interest is substantial, given the volunteers' established expectation of confidentiality and the undisputed prospect of unwanted solicitation." (*Pavement Coatings Technology Council v. United States Geological Survey*, Civil Action No. 14-1200 (KBJ), U.S. District Court for the District of Columbia, Dec. 19, 2019)

Judge Rudolph Contreras has ruled that while the Department of Justice has gotten closer to resolving the remaining issues left in litigation brought by Dylan Tokar, a reporter for the trade publication, *Just Anti-Corruption*, there are still unanswered questions pertaining to why certain names of attorneys were redacted from the records while the names of similar attorneys were disclosed. Tokar's original requests asked for records about the appointment of corrupt compliance monitors under the Federal Corrupt Practices Act. The monitors are hired and paid by the companies under scrutiny for violations and are intended to help investigate the causes of non-compliance and help implement policies aimed at reducing the risk of future misconduct. After DOJ's Criminal Division provided pre-disclosure notification to subject companies, 14 companies

objected to disclosure. DOJ eventually disclosed information on recommended candidates to serve as monitors. In his prior opinion in the case, Contreras ruled that DOJ had improperly narrowed Tokar's request and that the agency's withholding of names of non-selected monitor candidates, their firms, the private attorneys responding to response letters, and two DOJ processing attorneys was not justified. DOJ then disclosed emails that it had deemed non-responsive and released the names of DOJ attorneys and information about monitor candidates' former corporate clients. Tokar continued to challenge the withholding of names. He argued that much of the material was akin to information that would commonly appear in a resume. Contreras was less sure, noting that "the clients may have consented only to limited kinds of disclosure, and it is not clear that all of these CVs and biographies were intended to be (or were in fact) widely shared or published. And even then, past disclosure does not necessarily defeat an interest against further, potentially broader disclosure now." Contreras ordered DOJ to query the private attorneys and find out if they had their clients' permission for broader disclosure, and to assess the public domain status of such information. As to the disclosure of the names of government attorneys, Tokar provided evidence that the name of a DOJ attorney had been disclosed while the name of an SEC attorney had been redacted. Again sending the issue back to the agency, he pointed out that "given that DOJ has already been willing to release the names of the DOJ line attorneys involved in the relevant proceedings, the parties should be able to resolve this issue through further negotiations and, if necessary, production." (*Dylan Tokar v. U.S. Department of Justice*, Civil Action No. 16-2410 (RC), U.S. District Court for the District of Columbia, Dec. 19, 2019)

The D.C. Circuit has ruled that the FBI failed to sufficiently explain why records related to a 1982 article published by former Director William Webster concerning the mosaic theory were either not responsive to Ryan Shapiro's request or had been destroyed. Shapiro asked for records related to Webster's article. The FBI initially identified 28 potentially responsive files, but after closer examination, reclassified the files and told Shapiro that it found no responsive records. When Shapiro complained that the agency had not sufficiently explained how it determined that while 28 files were initially considered responsive, none of the files were ultimately disclosed. The agency told Shapiro that on review the files were found "either non-responsive because the files did not relate to specifics of [Shapiro's] request or were legally destroyed." Writing for the court, Senior Circuit Court Judge Stephen Williams noted that "the affidavit does not explain how the agency concluded that the files preliminarily listed as responsive did not relate to Dr. Shapiro's request. We recognize that the search slip purported to record a preliminary finding. And obviously the law should not force an agency to jump through complex hoops merely because a preliminary review seemed positive; such a rule would likely incline an agency to take a rather grudging view in its first screening." But, he observed, "where a record's presence on a search slip arose from some sort of 'hit' in the FBI's indexing system, and especially where the search slip distinguished between responsive and *potentially* responsive files, the FBI can obtain summary judgement (as to fields originally identified as 'responsive') only by offering some non-conclusory justification for each ultimate classification as non-responsive." Williams also faulted the FBI's affidavit for failing to explain why or how it knew the records were destroyed, presumably because of record destruction regulations. He pointed out that "the affidavit must set forth not just an agency's conclusion that it no longer possesses documents but also some underlying fact or facts to show the document's likely fate. At oral argument, government counsel suggested that the agency recorded the files' destruction in a log. If presented in an affidavit, such an explanation would suffice." (*Ryan Noah Shapiro v. United States Department of Justice*, No. 18-5123, U.S. Court of Appeals for the District of Columbia Circuit, Dec. 20, 2019)

. A federal court in Alaska has ruled that the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service **conducted an adequate search** for records requested by the Inter-

ACCESS REPORTS

Cooperative Exchange, a cooperative of fishermen who harvest and deliver crab in the Bering Sea and Aleutian Islands, pertaining to the underlying rationale behind a motion introduced by Glenn Merrill, NMFS's Assistant Regional Administrator for the Alaska Region to consider costs under an arbitration system to guide price negotiations between harvesters and processors. The court also found that the agencies had properly withheld records under **Exemption 5 (privileges)**. In response to the Inter-Cooperative Exchange's request, the agencies produced 146 records, including some redacted emails. The Inter-Cooperative Exchange filed an administrative appeal but filed suit before the agency responded, claiming that the search was inadequate and challenging the agency's claim that the attorney-client privilege applied to the withheld records. Merrill's declaration explained that although his first response inadvertently omitted the fact that he searched his cellphone and social media accounts he had conducted such a search and found no responsive records. The court noted that "based on Mr. Merrill's declaration, it is clear that Defendants conducted a search using reasonably calculated search terms and did not uncover any responsive records other than the ones already produced." The court added that "plaintiff infers that messages exchanged between councilmembers during council meetings must be official government business and that the existence of these messages undermines Mr. Merrill's claim that he does not conduct government business on his personal accounts." The Inter-Cooperative Exchange also argued that council members were not clients for purposes of the attorney-client privilege. The court disagreed, finding that "an attorney-client relationship does exist between all active participants in the email thread. The council and NMFS are clients of NOAA Office of General Counsel. The information contained in the email was made in confidence and intended to be protected from disclosure." (*Inter-Cooperative Exchange v. United States Department Commerce, et al*, Civil Action No. 18-00227-TMB, U.S. District Court for the District of Alaska, Dec. 16, 2019)

A federal court in New York has ruled that the SEC properly withheld records under **Exemption 7(A) (interference with ongoing investigation or proceeding)** pertaining to its investigation of Hertz for accounting fraud. The accounting fraud was allegedly perpetrated by Hertz's former chief executive and former chief financial officer. In July 2015, Hertz admitted to overstating its net income. The law firm of Robbins Geller Rudman & Dowd represented clients in a securities law class action lawsuit against Hertz for accounting fraud, alleging violations of the Securities Exchange Act. The SEC began its investigation of Hertz while the class action suit was ongoing. However, a district court in the District of New Jersey dismissed the case after finding that the element of scienter – a legal term that goes to the intent or knowledge of wrongdoing on the part of the defendant – had not been sufficiently pleaded. Robbins Geller appealed the dismissal and filed a FOIA request with the SEC for documents pertaining to the agency's investigation of Hertz. The SEC denied the request entirely under Exemption 7(A). In 2018, Hertz settled its Securities Act violations with the SEC, prompting Robbins Geller to renew its original FOIA request. The agency once again denied the request under Exemption 7(A). Robbins Geller filed an administrative appeal, which was also denied. Robbins Geller then filed suit, indicating that it was not interested in deliberative materials, but was only interested in in the investigative materials – which encompassed 160,000 documents Hertz provided during the investigation. After finding that the records had been compiled for law enforcement purposes, the court also concluded that disclosure could reasonably be expected to interfere with an ongoing law enforcement proceeding. Robbins Geller faulted one of the functional categories of records the SEC had identified to support withholding all the records, arguing that its description was too vague and anomalous to qualify as a category. The court disagreed, noting that 'the fact that there are multiple types of documents within a category does not render the category non-functional. Although present in a variety of forms, the SEC attests that each type of document in this category served the same purpose: it contains information that the SEC believes is related to the Hertz investigation." The court pointed out that "the contested category of documents. . . contains information related to the Hertz Investigation that third parties provided to the SEC. The SEC does more than state in merely conclusory terms that disclosure of these documents would interfere with the law enforcement proceeding; the SEC articulates how disclosure of this specific category of

documents would do so." Robbins Geller also argued that the agency had failed to consider whether any information was **segregable**. But the court observed that "the SEC does not need to conduct a document by document analysis to determine segregability." (*Robbins Geller Rudman & Dowd, LLP v. United States Securities and Exchange Commission*, Civil Action No. 19-933 (RER), U.S. District Court for the Eastern District of New York, Dec. 30, 2019)

A federal court in Texas has ruled that the Department of Treasury properly withheld records pertaining to a ratification notice for the appointment of administrative law judges by Treasury Secretary Steven Mnuchin as the result of the 2018 Supreme Court ruling in *Lucia v. SEC*, 138 S. Ct. 1044 (2018), holding that the appointment of the SEC's ALJs must comply with the Appointments Clause of the Constitution, under **Exemption 5 (privileges)**. Two months after the *Lucia* decision was announced, the Office of the Comptroller of the Currency reaffirmed that two ALJs at the Office of Financial Institution Adjudication had been properly appointed under the Appointments Clause. Saul Ortega and David Roberts, who were subject to a pending administrative proceeding, challenged the appointment of the two ALJs. To support their claim, Ortega and Robert submitted a FOIA request for records pertaining to Mnuchin's ratification. The agency disclosed five heavily redacted items, claiming both the deliberative process privilege and the attorney-client privilege. The unredacted portions of the records showed that Mnuchin had not selected the ALJs but that they had been properly appointed by the Comptroller General. After reviewing the records *in camera*, the court agreed with the agency's privilege claims. Ortega and Roberts argued that disclosing the redacted portions was in the public interest because they would show that Mnuchin had not selected the ALJs. The court found that was irrelevant and upheld the agency's claims, noting that 'plaintiffs have been shown the process by which [the two ALJs] were appointed as OCC ALJs. Thus, Plaintiffs have not been deprived of review of the nature and timing of the government's appointments." (*Saul Ortega and David Roberts v. United States Department of the Treasury*, Civil Action No. 19-1078, U.S. District Court for the Southern District of Texas, Houston Division, Dec. 20, 2019)

Judge James Boasberg has ruled that the U.S. Coast Guard conducted an **adequate search** for records pertaining to an incident in 2010 when the Coast Guard stopped Timothy Blixseth's yacht Piano Bar off the California coast. The agency told Blixseth that it had conducted a search and found no records. Blixseth filed an administrative appeal of the no records decision, explaining for the first time that Piano Bar was his yacht. With that information, the Coast Guard found one document, which it disclosed. Although the agency conducted multiple searches, it was not until Blixseth identified the Piano Bar as his yacht that the agency was able to locate one responsive record. Blixseth made multiple allegations suggesting why the agency's search was insufficient. But Boasberg pointed out that the agency "nonetheless pursued additional avenues once Plaintiff had informed the Government that he sought records regarding Piano Bar's interception and that it occurred near San Pedro, California. [The agency] contacted the Lieutenant Commanders in charge of vehicle detentions in both that area and in San Diego and directed further searches, which resulted in the retrieval of a 2012 Notice of Violation and a 2012 Statement of Compliance for Piano Bar. Even though their dates placed them outside Plaintiff's search parameters, the two records were forwarded on to him." Rejecting Blixseth's request for discovery, Boasberg observed that "here, [the agency's] search has been impressive in its comprehensiveness, and the agency should be commended for such diligent efforts in response to Plaintiff's queries. No more is required under FOIA." (*Timothy Blixseth v. United States Coast Guard*, Civil Action No. 19-2297 (JEB), U.S. District Court for the District of Columbia, Dec.16, 2019)

Judge Royce Lamberth, hearing a case from the Western District of Texas, has ruled that the Defense Department properly withheld records under **Exemption 6 (invasion of privacy)** as well as labeling some

records as **non-responsive** during its processing of a voluminous request from John Eakin for records identifying Americans who had died in World War II but whose bodies were not properly identified and returned to their families. Eakin's request encompassed 480,000 files known as Individual Deceased Personnel files of World War II American servicemembers that were being scanned as computer files. As part of a contract with Lockheed-Martin Integrated Systems to scan the files, DOD had provided files to Eakin for individuals whose last names started with the letters A or B, as well as some whose names started with the letter C. However, the agency had withheld some files because they were non-responsive and others because disclosure would violate the individual's privacy. Eakin challenged both decisions. On the issue of non-responsiveness, Eakin argued that the D.C. Circuit's ruling in *American Immigration Lawyers' Association (AILA) v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016), in which the D.C. Circuit held that agencies could not withhold records based on their determination that they were non-responsive but only on the basis of an exemption. Pointing out that *AILA* involved information that had been deleted from an email chain, Lamberth observed that "to say that thousands of IDPFs are analogous to one email chain stretches the bounds of rationality." He added that "the Defense Department is not attempting to conduct a sentence-by-sentence review of each IDPF's responsiveness." Eakin claimed that since the files dealt with deceased soldiers, Exemption 6 did not apply. Lamberth disagreed, noting instead that "although the IDPFs by their very nature contain a great deal of information about deceased persons, that does not mean there is nothing within those documents pertaining to living persons, which the Defense Department is entitled to redact." Lamberth concluded that the agency could continue to review the unprocessed records manually. He pointed out that "Mr. Eakin may find the government's process to be slow and unnecessary, but he requested hundreds of thousands of decades-old documents, so some measure of patience is required." (*John Eakin v. United States Department of Defense*, Civil Action No. 16-972-RCL, U.S. District Court for the Western District of Texas, Dec.17, 2019)

A federal court in New York has ruled that the U.S. Secret Service properly responded to a FOIA request from Perry Pendell, who had been charged with sexual contact with an underage girl. Pendell's request asked for extraction reports performed on a number of electronic devices. The agency denied Pendell's request under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. However, after Pendell's investigative file was closed, the agency disclosed the investigative file but redacted information on 28 pages under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency redacted information on 22 pages under **Exemption 7(E) (investigative methods or techniques)**. The court rejected Pendell's claim that his personal interest outweighed the individual privacy interests under Exemption 7(C) redactions. The court noted that "the fact that these individuals were involved in activity and investigations that are of unique interest to Plaintiff for his personal purposes does not alter the need for a sufficiently strong public interest." The court added that "Plaintiff has not offered any reason that the invasion of the relevant individuals' privacy as to these matters was warranted, much less that there is a significant public interest to outweigh that privacy interest." Upholding the 7(E) claims as well, the court pointed out that the agency's assertion that "disclosure of the techniques and methods by which Defendant is able to extract information from electronic devices would, if made public, allow individuals to devise ways to circumvent that technology and procedures that would undermine the efficacy of criminal investigations is both logical and plausible." (*Perry Pendell v. United States Secret Service*, Civil Action No. 18-0352 (GTS/TWD), U.S. District Court for the Northern District of New York, Dec. 16, 2019)

A federal court in Colorado has ruled that the Executive Office of U.S. Attorneys properly withheld Demetrius Freeman's grand jury transcript under **Exemption 3 (other statutes)**. Freeman requested the transcript of his own testimony before the grand jury. EOUSA denied the request, citing Rule 6(e) on grand jury secrecy. The court agreed, noting that "in the instant case, Plaintiff requested grand jury transcripts of only his cross examination. . . However, because Plaintiff's cross examination occurred before a grand jury,

the transcript will reveal 'the inner workings, scope or direction' of those proceedings. Therefore, Rule 6(e) prohibits the disclosure of the documents requested." Brown argued that he had a particularized need for the records. But the court pointed out that "a 'particularized need,' however, is not one of the exceptions to Rule 6(e); and although courts have accepted the 'particularized need' test for purposes of discovery under the Federal Rules of Civil Procedure, in a FOIA suit, the court does not consider the needs of the requestor." (*Demetrius T. Freeman v. Executive Office of U.S. Attorneys*, Civil Action No. 19-00879-CMA-KMT, U.S. District Court for the District of Colorado, Dec. 19, 2019)

Judge Beryl Howell has ruled that Ameer Flippin **failed to exhaust his administrative remedies** when he sued the National Park Police and the U.S. Capitol Police for records about individual police officers who were involved in his arrest. The National Park Police responded to Flippin's request by providing records with redactions under **Exemption 2 (internal practices and procedures), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Further, the agency's response provided information about how Flippin could file an administrative appeal. Flippin did not appeal the Park Police's response but filed suit instead against the Park Police and the U.S. Capitol Police. Howell agreed with the Capitol Police that, as part of Congress, they were not subject to FOIA. Howell noted that the Park Police had responded to Flippin's request before he pursued any judicial action. She pointed out that "before the plaintiff moved to reopen this action, [the agency] had in fact responded to his FOIA request, explaining (1) why certain information was withheld and (2) the plaintiff's right to pursue an administrative appeal. [The agency] has not 'abandoned' during the course of this litigation, and thus the plaintiff must exhaust his administrative remedies before obtaining judicial review." (*Ameer Flippin v. U.S. Department of Interior, et al.*, Civil Action No. 19-1221 (BAH), U.S. District Court for the District of Columbia, Dec. 31, 2019)

# #