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Washington Focus: The IRS has told requesters that they will be considered commercial requesters for purposes of the fee category if their requests focus on issues other their own tax status. In response to two requests for documents reflecting agency activities, one agency FOIA staffer indicated that unless a requester was gathering documents to support a tax dispute, or qualified as news media or a public interest group, they fell under the "commercial" category rather than the "other" category, although the legislative history of the statutory provision, as well as the subsequent OMB Fee Guidelines, make clear that the "other" category is the default category.

Court Rules Kavanaugh Background Check Privileged Presidential Communication

Judge Beryl Howell has ruled that the FBI's limited supplemental background investigation of Brett Kavanaugh while his nomination to the Supreme Court was temporarily stalled after allegations that he sexually assaulted Christine Blasey Ford at a party when they were both in high school, as well as other allegations that he had mistreated several women when he was at Yale University, is protected by the presidential communications privilege, regardless of whether it was ever shared with members of Congress. To assuage doubts expressed by then Sen. Jeff Flake (R-AZ), who, as a member of the Senate Judiciary Committee, indicated that he would not vote to approve Kavanaugh's nomination unless Blasey Ford's accusations were further investigated, the FBI was tasked with doing a supplemental background investigation (SBI) limited to Blasey Ford's allegations only.

That investigation yielded a 527-page file. In response to requests from BuzzFeed reporter Jason Leopold, who couched his requests in terms of documents shared with the Senate Judiciary Committee, the agency withheld the entire file under Exemption 5 (privileges), claiming the presidential communications privilege., arguing that "this privilege 'squarely' applies because the SBI – and therefore the SBI File – was solicited by the White House Counsel's Office in the service of a core, nondelegable function, namely the appointment of a Supreme Court Justice, and, further, the privilege remains intact, without the need for personal

invocation by the President and despite the furnishing of the file to the Senate Judiciary Committee." Leopold argued that the presidential communications privilege was not applicable since the SBI was done for the benefit of the Senate Judiciary Committee and was not intended to be part of presidential decision-making, that the FBI had not established that the file was received by the White House Counsel's Office, that the privilege was waived when the SBI was shared with the Senate Judiciary Committee, which published a summary, and that the presidential communications privilege could only be invoked by the President.

Howell first addressed whether such records qualified under the inter- or intra-agency threshold of Exemption 5. She noted that "to be sure, FOIA applies only to federal agencies and 'Congress did not intend the word "agency' to include the President, his 'immediate personal staff, or units in the Executive Office whose sole function is to advise and assist the President.'" But she pointed out that "the D.C. Circuit has explained, 'the Supreme Court [has] deemed it 'beyond question' that documents prepared by agency officials to advise the President were within the coverage of Exemption 5 because they were 'intra-agency' or 'inter-agency' memoranda or letters that were used in the decision-making processes of the Executive Branch.' For this reason, the D.C. Circuit has consistently viewed Exemption 5 as covering the presidential communications privilege, among other privileges."

Noting that case law approved of the application of privileges recognized under Exemption 5 to such records, Howell questioned Leopold's claim that because the recent Supreme Court decision in *Food Marketing Institute v. Argus Media Leader*, 139 S. Ct. 2356 (2019), in which the Supreme Court found that the substantial harm test under Exemption 4 (confidential business information) was not supported by the plain language of the exemption, articulated the elements for promises of confidentiality by the government, "the transmittal of the SBI File to the White House Counsel's Office, a non-agency government entity, stripped these records of protection under Exemption 5." She pointed out that "to the extent plaintiffs believe that *Argus Leader* requires new attention to the text of Exemption 5's first condition of an inter- or intra-agency communication, binding precedent in this circuit again dictates the result." She explained that in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), the Supreme Court recognized that deliberations between agencies and outside entities could be privileged if the outside entity's interests were not adversarial. She observed that "the D.C. Circuit has continued, post-*Klamath*, to apply its functional approach to find that communications between agencies and outside, or non-agency, entities may indeed meet the statutory condition of Exemption 5."

Howell then rejected Leopold's claim that the presidential communications privilege did not apply because the SBI was not used for presidential decision-making. Instead, she noted that "even if the activity on the Senate Judiciary Committee prompted the SBI, the White House Counsel's Office, not the Committee, actually 'solicited' the SBI in connection with the nomination of a Supreme Court Justice. . .and, thus, this request was made in the service of a nondelegable presidential duty." Leopold argued that pressure from Congress resulted in the SBI and that Howell should take that into consideration. But Howell observed that "even if the court were equipped to test the motivations for a specific presidential action in a dynamic political context, doing so would turn the whole point of the presidential communications privilege on its head by undermining the President's ability to 'make decisions confidentially.' This Court declines to proceed down this proverbial rabbit hole."

She then rejected Leopold's waiver argument as well. She pointed out that "disclosure by Congress alone cannot result in a waiver of privilege because 'we do not deem "official" a disclosure made by someone other than the agency from which the information is being sought.' Thus, the D.C. Circuit has repeatedly confirmed that disclosure by Congress does not prevent the Executive Branch from asserting privilege to withhold records under FOIA."

Leopold also contended that notes used by FBI agents in preparing their FD-302s were not protected. But Howell pointed out that "the privilege applies to the SBI File in full and covers those pages of hand-written interview notes and administrative notes containing information presented elsewhere in the File, even if the FBI is unable to establish that those notes were transmitted to the White House Counsel's Office." (*BuzzFeed, Inc., et al. v. Federal Bureau of Investigation*, Civil Action No. 18-2567 (BAH), U.S. District Court for the District of Columbia, May 7)

Views from the States

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

Alaska

The supreme court has ruled that because the disciplinary records of two Alaska state troopers are protected personnel records under the State Personnel Act, they are not subject to disclosure under the Public Records Act. Kaleb Lee Basey, who was convicted of federal crimes, filed a federal civil rights lawsuit against several state troopers based on their actions during the investigation and arrest. Basey filed a public records act request for records concerning the investigation, including the troopers' disciplinary records. The state police withheld the records, claiming that the information pertained to pending litigation. Basey filed suit and the trial court ruled in the agency's favor. Basey appealed and the supreme court ruled that the pending litigation exception applied only when a public agency was involved, that the agency had not shown that the law enforcement exemption applied, and remanded the case back to the trial court. On remand, the trial court ruled that because disciplinary records were not listed as one of the exceptions to non-disclosure in the State Personnel Act, they were exempt. Basey appealed that ruling as well. This time, the supreme court invited open government advocates to submit amici curiae briefs. Basey argued that the state police had waived its ability to claim that the records were exempt under the State Personnel Act by not bringing it up the first time. The supreme court disagreed, noting that "we cannot adopt a rule requiring the State to violate a law – and possibly prejudicing State employees not involved in the litigation – by disclosing employees' personnel records because the State failed to timely invoke the relevant statute." But the supreme court also observed that "though we do not adopt a per se waiver rule, procedural rules may prevent serial objections in some public records cases." The supreme court then found that the State Personnel Act protected the records. The supreme court pointed out that "given that a specific type of disciplinary records may be disclosed, the logical inference is that under the statute all disciplinary records are personnel records. Absence of other disciplinary records from that list of disclosable personnel records implies that all other disciplinary records must be confidential." (*Kaleb Lee Basey v. State of Alaska, Department of Public Safety*, No. S-17099, Alaska Supreme Court, Apr. 24)

Arkansas

The supreme court has ruled that prisoner Russell Berger is not entitled to use the Arkansas Freedom of Information Act and has dismissed his case as a result. Dismissing Berger's case, the supreme court noted that "even if Berger had requested disclosable information, he would not have been entitled to inspect it. Simply put, there is no justiciable clam against either [State Police Director Bill] Bryant of the Arkansas State Police because Berger is not entitled to inspect their public records. While there are legal avenues for a defendant to access certain records in his or her criminal case, this particular FOIA case is not one." (*Russell Berger v. Bill Bryant, Director, Arkansas State Police*, No. CV-17-616, Arkansas Supreme Court, Apr. 23)

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California

A court of appeal has ruled that because a provision in the health and safety code requiring drug manufacturers to provide a 60-day notice to public and private registered purchasers before increasing prices has no confidentiality requirement, California Correctional Health Care Services was not required to withhold the information under the evidentiary trade secrets privilege in responding to a request from Reuters for copies of the price increase notices CCHCS had received. After learning that CCHCS had received a request from Reuters for the price increase notices, Amgen filed a reverse-FOIA action to block disclosure. Amgen also requested a preliminary injunction, which the trial court granted. CCHCS appealed the grant of a preliminary injunction. While that appeal was pending, the trial court ruled that Amgen had not made its case for a writ of mandamus but allowed the company to amend its complaint. Instead, Amgen dismissed its action. At the court of appeal, Amgen argued that since it had dismissed its action, the matter was moot. CCHCS argued that the trial court erred in finding that Amgen had made a sufficient showing that the price increase notice met the definition of a trade secret. The appeal court agreed with CCHCS, noting that "Amgen has failed to demonstrate that once it disclosed its price increase information pursuant to [the health and safety code provision], that information retained whatever status it may previously have had as a trade secret." The court of appeal, instead, observed that "given the price increase notice's disclosure to an unknown number of recipients, none of whom was bound to keep it in confidence, it would not appear that Amgen's price increase notice would be called 'secret.'" (*Amgen, Inc. v. Healthcare Services*, No. B296563, California Court of Appeal, Second District, Division 1, Apr. 9)

Kentucky

A court of appeals has ruled that the Kentucky State Police failed to show that disclosure of its Uniform Citations File database in response to an Open Records Act request from *Courier-Journal* reporter Justin Price would be unduly burdensome because it would require redaction of personal information from the database. Price complained to the Office of the Attorney General. The Attorney General's Office found that the state police had violated its obligation to separate out non-exempt data. The state police then appealed that decision to the trial court, which also ruled in favor of Price. The state police then appealed to the court of appeals. There, the appeals court pointed out that "there is undisputed evidence in the record in the form of [an agency] affidavit that KSP could perform the necessary redactions at a cost of $15,000." The state police argued that doing so would require creating a new record. But the appeals court noted that "modifying the KyOPS database to enable redactions by entire categories of information, as opposed to the tedious and time-consuming review of every individual entry, does not constitute creating a new record because the end product of either process would be exactly the same." (*Department of Kentucky State Police v. Courier-Journal*, No. 2019-CA-000493-MR, Kentucky Court of Appeals, Apr. 17)

The Federal Courts…

The Second Circuit has ruled that visitors' logs for President Donald Trump's residence at Mar-a-Lago are White House records not subject to FOIA. Although the D.C. Circuit ruled during the Obama administration, in *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), that although the Secret Service temporarily used White House visitors' records to oversee the coming and going of visitors to the White House, that use was only temporary and the records themselves were ultimately meant to be retained by White House staff. The Obama administration continued to disclose most visitors' records after 30 days, but the Trump administration discontinued the practice altogether. Having struck out in the D.C. Circuit, a coalition of public interest groups including the National Security Archive, CREW, and the Knight First

Amendment Institute, filed suit in the Southern District of New York after being denied access to visitors' records at the White House and Mar-a-Lago. The district court agreed with the D.C. Circuit's rationale and sided with the government. The coalition appealed to the Second Circuit, arguing that the D.C. Circuit's decision strayed from the definition of agency record articulated by the Supreme Court in *Dept of Justice v. Tax Analysts*, 492 U.S. 136 (1989), finding that documents qualified as agency records "if they (1) are created or obtained by an agency, and (2) "have come into the agency's possession in the legitimate conduct of its official duties." The coalition argued that "because neither party disputes that the Secret Service obtained the visitor logs in furtherance of its duty to protect the President. Because both prongs of *Tax Analysts* are satisfied, the plaintiffs assert, the visitors logs necessarily qualify as agency records under FOIA." However, the Second Circuit observed that "*Tax Analysts* does not resolve this appeal." The Second Circuit pointed out that "this case, by contrast, concerns the disclosure of virtually every visitor that the President received over a seven-week period at home and at work. Why does this matter? Because the Supreme Court [in *Cheney v. U.S. District Court for D.C.*, 542 U.S. 367 (2004)] tells us, 'special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.' *Tax Analysts* does not suggest that those considerations disappear when we interpret the FOIA." Relying on a portion of the D.C. Circuit's decision in *Judicial Watch* suggesting that disclosure of visitors logs would impact the ability of the President to seek candid and confidential input, the Second Circuit noted that "compelled disclosure of the visitor logs would affect a President's ability to receive unfettered, candid counsel from outside advisors and leaders, both domestic and foreign, who were aware that their visits to the White House would be subject to public disclosure." The Second Circuit pointed out that "we therefore follow the lead of *Judicial Watch* in declining to compel the disclosure of those logs under FOIA given the difficult but avoidable constitutional question that compelling disclosure would raise if we were to interpret 'agency records' in a different way." The coalition argued that by relying on a separation of powers argument the government was creating a tenth exemption. The Second Circuit rejected that claim, noting that "to the contrary, our application of the avoidance canon is limited to the very narrow circumstances involving the availability under FOA of the President's schedules and visitor logs for Mar-a-Lago and the White House Complex respectively." (*Kate Doyle, et al. v. United States Department of Homeland Security*, No. 18-2814, U.S. Court of Appeals for the Second Circuit, May 18)

Judge Rudolph Contreras has ruled that the U.S. Postal Service has now provided a sufficient explanation for its decision to continue to withhold 20 pages from a Whitepaper prepared by USPS's Office of the Inspector General concerning the use of middlemen to resell postal services. DBW Partners, which ran the Capital Forum, a subscription news service that focused on specific transactions and investigations, submitted two FOIA requests to USPS pertaining to the agency's relationship with Stamps.com. One request asked for an OIG Whitepaper entitled "Postal Partnerships: The Complex Role of Middlemen and Discounts in the USPS Package Business." USPS withheld the Whitepaper under **Exemption 3 (other statutes)**, citing § 410(c)(2) of the Postal Reorganization Act, which allows the agency to withhold information of a commercial nature that under good business practices would not be publicly disclosed. DBW Partners filed suit and Contreras found that the agency had not shown that the entire Whitepaper was protected. The agency supplemented its affidavit to better justify its Exemption 3 claim. By the time Contreras ruled, only 20 pages of the Whitepaper were still being withheld entirely. DBW Partners challenged the agency's **segregability analysis**, arguing that the agency had taken a piecemeal approach to the segregability review by addressing the issue section-by-section rather than as a whole. Contreras pointed out that "there is no strict level of detail that an agency must provide when explaining its segregability review, so long as the explanation provided is 'sufficient to explain the reasons [the agency's] withholding and segregation decisions. USPS has explained that it reviewed each position of the document for segregable material and that it has produced what it could. For the most part. . .this suffices to carry the agency's burden on segregability." Contreras had reviewed the

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remaining redactions *in camera* and found some portions that could be disclosed. He pointed out that "the Postal Reorganization Act only exempts from FOIA '*information of a commercial nature*. . .which under good business practice would not be publicly disclosed. Because the information contained in these paragraphs is not 'of a commercial nature,' it is irrelevant whether it would be good business practice to disclose it. The Postal Service's obligations under FOIA, which favors disclosure, win out where 'information of a commercial nature' is not directly implicated." (*DBW Partners, LLC d/b/a The Capital Forum v. United States Postal Service, et al.*, Civil Action No. 18-31278 (RC), U.S. District Court for the District of Columbia, Apr. 28)

Judge Tanya Chutkan has ruled that U.S. Immigration and Customs Enforcement properly withheld identifying information concerning 12 individuals who were arrested in July 2018 in the District of Columbia as part of a 12-day operation by the agency in the Washington, D.C. metropolitan area that resulted in the arrest of 132 individuals. The District of Columbia requested records on the 12 individuals arrested in the District. ICE located 390 pages but disclosed only 46 pages. The agency claimed that under *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), in which the D.C. Circuit ruled that absent evidence of misconduct third-party identifying information in law enforcement records was categorically exempt, the names of the 12 arrestees could be categorially withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records).** The District argued that *CREW v. Dept of Justice (CREW I)*, 746 F.3d 1082 (D.C. Cir. 2014), in which the D.C. Circuit indicated that *SafeCard Services* did not apply in toto to personal data where the subject of the investigation – in this case former majority leader Tom DeLay (R-TX) – had been publicly identified. Chutkan found that the District had misinterpreted the reach of *CREW I* and that it was not applicable under the circumstances here, noting that "this is not a case where the individuals have already been publicly implicated in the ICE operation." Chutkan then rejected the District's arguments that the arrests were improper or that the names had already been publicly disclosed. She pointed out that "the District focuses on the fact that the arrestees' prior convictions and pending charges are public information. But those prior disclosures have no bearing on the arrestees' primary privacy interest – not being connected to ICE's enforcement operation. The District has not shown that there was any prior disclosure of the investigation underlying the disputed records – i.e., ICE's arrests or resulting proceedings – that would trigger a diminished privacy interest." (*District of Columbia v. United States Immigration and Customs Enforcement*, Civil Action No. 18-2410 (TSC), U.S. District Court for the District of Columbia, May 18)

A federal court in New York has ruled that the FCC failed to show that IP addresses and User-Agent headers provided in public comments to the agency concerning its decision to repeal the net neutrality rules promulgated during the Obama administration can be withheld under **Exemption 6 (invasion of privacy)** or that processing the comments would be **unduly burdensome**. *New York Times* reporters Nicholas Confessore and Gabriel Dance requested the comments, many of which were attached only to IP addresses and contained no obvious personal data. After the agency failed to respond within the statutory time limit, the reporters filed suit. The agency justified its withholdings under Exemption 6 and its contention that processing the information would be too burdensome. The agency argued that even so some personal information could be gleaned by a sophisticated requester. Judge Lorna Schofield found the agency had not sufficiently made it case on that issue, noting that "if the record provided further insight into how likely it is that this risk would materialize, then the agency might have sustained its burden of showing that the disclosure of IP addresses and User-Agent headers would compromise a substantial privacy interest. But the general statements in the agency's declaration that IP addresses and other digital identifiers 'often can reliably be linked to individual persons' to create 'detailed profiles' fall short." In contrast, Schofield found a public interest in disclosure. She pointed out that "disclosing the requested data in this case informs the public understanding of the

operations and activities of government in two ways – at the micro level with regard to the integrity of the FCC's repeal of the particular net neutrality rules at issue, and at the macro level with regard to the vulnerability of agency rulemaking in general." The agency claimed that it had considered all public comments in its final rule. But Schofield observed that "this misunderstands the public interest at stake. The concern in not whether the FCC was appropriately responsive to certain comments. Rather, the concern is whether the notice-and-comment process functioned as a check on agency rulemaking authority as prescribed by federal administrative law." Schofield also rejected the agency's contention that writing a computer script to search for the records the reporters had requested would be unduly burdensome. However, Schofield pointed out that "this 'matching and sorting' process is closer to an automated search for responsive records than a scavenger hunt for disparate information." She added that "the FCC has made no showing that creating and running such a script would require more than 'reasonable efforts to search' or 'would significantly interfere with the operation of the agency's automated system.'" (*New York Times Company, et al. v. Federal Communications Commission*, Civil Action No. 18-8607 (LGS), U.S. District Court for the Southern District of New York, Apr. 30)

Judge Randolph Moss has ruled that, with two exceptions, the Department of State properly responded to a FOIA request from Citizens United for records concerning a visit to the State Department by British intelligence operative Christopher Steele and a briefing he gave to agency officials pertaining to Russian interference in the U.S. presidential election. In processing the request, the agency consulted with the FBI pertaining to possible exemption claims. By the time Moss ruled there were only a handful of documents still in dispute. One disputed document was a five-page memo prepared by a third party that had been withheld under **Exemption 3 (other statutes)**, citing the National Security Act. Moss noted that the FBI's affidavit provided sufficient justification for withholding the memo. He pointed out that the FBI "attests that Document 7 is a five page memorandum prepared by a third party; that it was not prepared by Christopher Steele; that it relates to a 'technical subject' of potential law enforcement interest to the FBI's investigation of Russian interference in the 2016 Presidential election; that disclosure could reveal intelligence sources and methods; and that such a disclosure would be used by adversaries of the United States – including foreign states – to avoid FBI detection. The [agency's] declaration goes as far as the Court could reasonably demand, short of requiring disclosure of the protected information itself." Citizens United argued that since then Rep. Mark Meadows (R-NC) had apparently reviewed the document in an unclassified setting and found it innocuous, it could not be considered classified. But Moss indicated that Citizens United had missed the point. He observed that "an 'intelligence source' within the meaning of the National Security Act is a person or entity that 'provides, or is engaged to provide information the [intelligence community] needs to fulfill its statutory obligations.' . . .Given the breath of the statutory text and the deference owed to the FBI's determination, Citizens United's reliance on the purported fact that Document 7 contains information from open-source media does little to further its cause. Even if the Court credits Citizen United's assertion about the document's contents, the record still 'relates to intelligence sources [or] methods' and thus falls squarely within the broad sweep of the statutory protection." For two documents withheld under **Exemption 1 (national security)**, Exemption 3, and **Exemption 7(E) (investigative methods and techniques)**, Moss agreed with Citizens United that the State Department had not provided sufficient justification for the redactions made. He pointed out that "but aside from describing the documents and the FOIA exemptions relied on in making its redactions, the Department offers no explanation or justification for its decisions. . .The Court cannot ascertain, for example, whether the redactions to Documents 4 and 9 are properly classified pursuant to an executive order or whether the redacted information falls within the ambit of the National Security Act. Thus, before the Court can address whether the redactions were proper, it will require a more detailed explanation by the Department." (*Citizens United v. United States Department of State*, Civil Action No. 18-1862, U.S. District Court for the District of Columbia, May 19)

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A federal court in California has ruled that Dennis Buckovetz failed to show that the Department of the Navy's policy of refusing to process duplicative requests constituted a **pattern or practice** violation of the FOIA because the Navy disclosed all records responsive to his requests. Based on the Eleventh Circuit's ruling in *Sikes v. Dept of Navy*, 896 F. 3d 1227 (11th Cir. 2018), finding that the Navy violated FOIA by refusing to process a second request submitted by Sikes because it was deemed duplicative of a prior request, Buckovetz made the same claim, alleging that the agency had also rejected his duplicative request. While the court indicated that Buckovetz had met the first two prongs identified by the Ninth Circuit in *Hajro v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086 (9th Cir. 2016) to establish a pattern or practice claim, the court explained that since the Navy ultimately disclosed all responsive records to Buckovetz he had not been harmed by the policy. The court pointed out that "despite his assertion that he has been denied responsive records, there is nothing in the record to support the allegation that records were or have been withheld. Defendants continued to service Plaintiff's 2018 FOIA request even after administratively closing the claim under its policy. The closure had no effect and, consequently, Plaintiff was not personally harmed by the administrative closure of his 2018 FOIA request." The court observed that it was not holding that Plaintiff "lacks standing because he received responsive records. If that were the case, no pattern and practice claim could survive if the agency ultimately produced responsive records." (*Dennis M. Buckovetz v. United States Department of the Navy*, Civil Action No. 18-2736-MDD-KSC, U.S. District Court for the Southern District of California, May 7)

A federal court in Colorado has ruled that U.S. Fish and Wildlife Service properly responded to two FOIA requests submitted by Friends of Animals pertaining to importation of African Elephant and Giraffe skins, hides, and products. The Office of Law Enforcement, which investigates wildlife crimes, regulates wildlife trade, and works to protect wildlife resources, uses Form 3-177 to collect information on species being transported, the names of importers and exporters, the quantity and monetary value of shipments, and relevant permit numbers. In response to Friends of Animals' requests, the agency provided 847 pages of responsive Form 3-177 records for the elephant request. It withheld records under **Exemption 4 (confidential business information), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In response to the giraffe request, the agency told Friends of Animals that it would redact names of importers and exporters from its Excel spreadsheet responsive to the request under Exemption 6 and Exemption 7(C). Friends of Animals argued that the records on imports and exports were not commercial for purposes of Exemption 4. However, the court noted that "here, the withheld information pertains to the source and vendor involved in a commercial transaction with the submitter as well as the volume and value of goods the submitter was importing as part of its business. Release of such information could reasonably result in harm to the submitter's business." The court also agreed that the agency had provided sufficient assurances to submitters that their information would be treated confidentially. The court observed that "defendant's notice assures submitters that their information will not be given, sold, or transferred to third parties except as required by law. This is a direct assurance that their information is private. The fact that the information *could* be disclosed pursuant to FOIA is true of all information held by the government. FOIA's application to government information alone is not enough to defeat any assurances of privacy in information held by the government; otherwise, the statute's mere existence would preclude the application of Exemption 4 in any instance." Although the court found that FWS had not shown that it was a law enforcement agency, it agreed that the Office of Law Enforcement qualified, noting that "defendant has met its burden of demonstrating that the information it seeks to withhold from Plaintiff pursuant to Exemption 7 was compiled for 'law enforcement purposes.'" Finding that Friends of Animals had articulated no public interest in disclosure of the names of wildlife crime investigators, the court observed that "in this case, disclosing the names of individuals would not likely advance a significant public interest, and the Court finds,

balancing the competing interests in privacy and disclosure, that the invasion of personal privacy from release could reasonably be expected to be unwarranted." (*Friends of Animals v. David Bernhardt*, Civil Action No. 19-01443-MEH, U.S. District Court for the District of Colorado, Apr. 24)

After agreeing with the James Madison Project that it had preserved its challenge to the Justice Department's redactions made to 391 pages of the Carter Page FISA warrant application under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, Judge Amit Mehta has rejected JMP's claim that two tweets from President Donald Trump constituted official acknowledgment of the records. Mehta pointed out that "the President's tweets amount to little more than 'a mere assertion of bad faith [that] is not sufficient to overcome a motion for summary judgment.' Although Plaintiffs tout that the tweets 'come from the highest government authority,' neither tweet reveals any personal knowledge on the part of the President with respect to the actual withholding and the exemptions invoked. The President's statement that the disclosed records are 'ridiculously heavily redacted' does not undermine the validity of the declarants' invocation of Exemptions 1 and 3. And his insistence that the records were 'classified to cover up government misconduct' is unsupported and, without more, cannot overcome the national security justifications put forward in the detailed affidavits submitted by Defendants." (*James Madison Project, et al. v. United States Department of Justice*, Civil Action No. 17-00597 (APM), U.S. District Court for the District of Columbia, May 4)

Judge Tanya Chutkan has ruled that the FBI failed to show that it **conducted an adequate search** for records in response to multi-part FOIA request submitted by researcher James Colgan concerning the agency's FOIA program. The agency ultimately disclosed more than 10,000 pages. Colgan selected a **sampling** of 450 pages to test the agency's exemption claims. Of that sampling, the agency disclosed 272 pages in full, and 155 pages in part. As a result, the FBI reviewed all withheld pages, making changes in 1,915 pages and releasing 1,745 pages. Chutkan found several instances in the agency's processing of Colgan's multiple requests where the agency had failed to show that its search was adequate. She rejected the agency's claim that field offices were not searched because they were not involved in rule changes. She pointed out that the assertion in the agency's affidavit that "field offices are not involved in policy decisions has no bearing on whether the field offices were informed of the rule change and would have responsive documents. Again, the FBI does not explain why it limited its search to the [Central Records System] and the [FOIPA Document Processing System], especially given Colgan's suggestion that other systems and field offices would likely have responsive records. Because the FBI fails to articulate why the places it searched were the only places likely to have responsive records, especially given some of the requests directed to other likely locations, it has not shown that its search was adequate." Chutkan particularly faulted the agency for the error rate in its sampling, which Colgan calculated at 64 percent. The FBI argued that it had cured that problem by reprocessing the non-sampled records. But Chutkan observed that "while the FBI is correct that [case law precedent] involved cases in which non-sample pages were not re-processed, the principle applies equally here where the operative *Vaughn* index is based on the error-ridden sample. Even though the FBI reprocessed the remaining pages, it rendered the sample unrepresentative by changing the treatment of the documents underlying the sample. A sample is drawn from a larger pool; here, the larger pool was changed after the sampling. Therefore, the sample is no longer representative of the underlying pool – even if the agency intended to treat the documents consistently." (*James Calhoun Colgan v. Department of Justice*, Civil Action No. 14-740 (TSC), U.S. District Court for the District of Columbia, Apr. 28)

A federal court in Colorado has ruled that Rocky Mountain Wild is not entitled to **discovery** in its litigation against the Bureau of Land Management for records concerning a number of parcels made available

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for leasing. In response to Rocky Mountain Wild's request, BLM located 3,239 responsive records and withheld 173 pages in full and 336 pages in part. In challenging the agency's decision, Rocky Mountain Wild asked for discovery, claiming the agency's affidavits submitted by Brian Klein and Diane Fisher were not based on personal knowledge as required under Rule 56(f). District Court Judge Philip Brimmer rejected the discovery request, explaining that "plaintiff has not made an effort to describe, with any specificity, the facts plaintiff seeks to discover, plaintiff's previous efforts to obtain those facts, and how the facts are essential to rebutting defendants' summary judgment motion." Rocky Mountain Wild argued that Klein was too far removed from the actual searches – which were conducted by six employees in two field offices. But Brimmer approved his affidavit, noting that "while Mr. Klein's declarations lack certain details regarding the search process. . .the Court finds the information provided sufficiently detailed to 'afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the [Court] to determine if the search was adequate in order to grant summary judgment.'" Rocky Mountain Wild also faulted the agency's failure to search more broadly for records pertaining to the NEPA approval process. Brimmer, however, pointed out that "had plaintiff intended to make a broader request for all NEPA analysis concerning the parcels at issue, it could have done so. Here, however, the BLM was not required to look beyond the plain language of plaintiff's FOIA request for records related to the [Resource Management Plan]." While Brimmer upheld the agency's decision to limit the search to a list of specialists, he noted that BLM had failed to show why it did not conduct a search of its Washington offices. Brimmer also upheld the agency's **Exemption 5 (privileges)** claims, noting that a series of emails were protected by the attorney-client privilege. (*Rocky Mountain Wild, Inc. v. United States Bureau of Land Management*, Civil Action No. 17-00636-PAB-SKC, U.S. District Court for the District of Colorado, Apr. 22)

Judge Amit Mehta has ruled that the Executive Office of U.S. Attorneys has failed to show that records related to the grand jury that indicted Osvaldo Rodriguez in the Southern District of New York constitute matters occurring before the grand jury for purposes of Rule 6(e) on grand jury secrecy. Mehta noted that "based on the [agency's declaration] and the *Vaughn* Index, the court cannot determine whether each withheld record, if disclosed, 'would tend to reveal some secret aspect of the grand jury's investigation.' That evaluation is not possible, because the *Vaughn* Index places the grand jury material in three broad categories – 'Grand Jury Records,' 'Grand Jury Transcripts,' and 'Grand Jury Preliminary Matters' – that do not allow the court to make the required 'touchstone' assessment. An agency is permitted to take a categorical approach, but the categories used here are too general to permit a meaningful inquiry." He observed that "in the end, even if the substantial majority of records withheld by Defendants are entitled to protection, because of the broad nature of the category descriptions, the court cannot determine the applicability of Exemption 3 to each responsive record." (*Osvaldo Rivera Rodriguez v. United States Department of Justice Executive Office of the United States Attorney*, Civil Action No. 19-02510-APM, U.S. District Court for the District of Columbia, Apr. 30)

After receiving supplementary affidavits from those agencies whose exemption claims he had previously found not sufficiently supported, Judge Rudolph Contreras has ruled that the Army, the Defense Intelligence Agency, and the Joint Task Force at Guantanamo have now shown that their exemption claims and **segegability** analyses were appropriate. With a single exception, Contreras resolved a 13-year-old case filed by Gregg Bloche and Jonathan Marks for records concerning medical professionals participation in torture, finding that claims made under **Exemption 5 (privileges), Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 7(E) (investigative methods and techniques)** were appropriate. (*M. Gregg Bloch 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, May 14)

A federal court in Washington has ruled that U.S. Immigration and Customs Enforcement has not shown that redacting personally identifying information from Form I-213s, which are records of deportable/ inadmissible aliens, created since January 2012, would be **unduly burdensome**. In response to requests from the University of Washington's Center for Human Rights to ICE and U.S. Customs and Border Protection, ICE took the position that because the records fell under the Privacy Act, the records could not be disclosed without individual third-party privacy waivers. By the time the dispute reached the court, ICE had abandoned that position but insisted that personally identifying information would need to be redacted before disclosure. Judge Barbara Rothstein rejected the agency's claim that she did not have sufficient agency affidavits to rule on the disclosure issue. Instead, Rothstein noted that "the question at issue here not the sufficiency of the production or propriety of redactions, but whether the parties have come to an agreement on the precise acceptable terms of the request, and whether ICE has even made a good-faith effort to initiate a responsive search." As a result, she ordered the parties to meet and come up with a satisfactory production schedule. (*University of Washington, et al. v. United States Department of Homeland Security, et al.*, Civil Action No. 18-01396 BJR, U.S. District Court for the Western District of Washington, Apr. 21)

The Ninth Circuit has remanded that portion of the district court's ruling that the National Association of Biomedical Research, after it intervened to protect information it provided to U.S. Fish and Wildlife Service, failed to show that the disclosure of the information would cause substantial competitive harm under **Exemption 4 (confidential business information)**. The Ninth Circuit indicated that while the appeal was pending, the Supreme Court had ruled in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) that the competitive harm test was not supported by the plain language of Exemption 4. As a result, the Ninth Circuit panel pointed out that "we vacate the judgment as it applies to NABR and remand for further proceedings. The district court did not have the benefit of *Food Marketing* in deciding whether the disputed information was 'confidential,' and we decline to apply the new legal standard in the first instance." The Ninth Circuit panel added that "similarly, because the district court assumed without deciding that the information was 'commercial information,' we decline to resolve that issue." (*Center for Biological Diversity v. United States Fish and Wildlife Service*, No. 18-15997, U.S. Court of Appeals for the Ninth Circuit, Apr. 23)

In three closely related cases, a federal court in California has ruled that although the Bureau of Indian Affairs failed to respond to three requests from researcher Emilio Reyes for records pertaining to named individuals' tribal affiliations, Reyes did not show that the agency's failure to respond on time constituted a **pattern or practice** violation of FOIA. The agency located 93 pages responsive to two requests, disclosing 47 pages in full, and 31 pages in part. In response to the third request, the agency located 20 pages, disclosing six in full and 14 in part. After finding that the agency's searches were adequate, the court rejected Reyes' contentions that the agency's failure to respond on time constituted a pattern or practice violation. The court noted that "a thorough review of Plaintiff's complaint demonstrated he did not assert a claim based upon a pattern or practice. His complaint merely alleges delays in responding to his FOIA requests. Defendants do not dispute that the responses were untimely. Instead, Defendants argue any claims based on their untimely responses are moot because they processed Plaintiff's records requests and properly applied the exemptions. Generally, an agency's production of al non-exempt information, 'however belatedly, moots FOIA claims.'" (*Emilio Reyes v. United States Department of the Interior, et al.*, Civil Action No. 17-01612 JAH-RBB, Civil Action No. 17-1418 JAH-RBB, and Civil Action No. 17-1571 JAH-RBB, U.S. District Court for the Southern District of California, May 11)

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A federal court in California has ruled that Randol Schoenberg, who sued the FBI for disclosure of the search warrant obtained by the agency to seize and review the contents of a laptop that belonged to Huma Abedin, is not entitled to **attorney's fees** because while Schoenberg had limited success, the government's had shown that its withholdings had a reasonable basis in law. The court indicated that it would have limited Schoenberg's fee award to $9695, and then reduced it in half to $4847.50 if it had found Schoenberg was entitled to fees. However, the court concluded that because the government's legal position was reasonable, Schoenberg was not eligible for any award. (*E. Randol Schoenberg v. Federal Bureau of Investigation*, Civil Action No. 18-01738 JAK (AGRx), U.S. District Court for the Central District of California, May 8)

A federal court in Illinois has resolved numerous requests from prisoner William White pertaining to various neo-Nazi and white supremacists' organizations submitted to the FBI, the Bureau of Alcohol, Tobacco and Firearms, and the U.S. Marshals Service, finding that the agencies **conducted adequate searches**, were properly processing them at a rate of 500 pages a month, and had properly applied exemptions. Most of White's requests were aimed at the FBI. The court noted that it "declines to retain jurisdiction over the FBI's ongoing production of records responsive to White's requests. As White noted, at the rate of the FBI is disclosing records, it may not be finished for decades of the value of documents is as White expects. The Court is unprepared to provide continuous oversight of the FBI's on-going productions for that entire time. The FOIA was never intended to make the Court a perpetual supervisor of Executive Branch agencies. Instead, the Court is satisfied that the FBI is meeting its obligations under the FOIA, and if White has any further complaints about how those obligations are carried out – say, claims of specific exemptions – he should file an administrative appeal and then, after exhausting his administrative remedies, file a new lawsuit." The court also found that the Bureau of Prisons had responded appropriately to a series of requests White had sent to that agency. (*William A. White v. Department of Justice*, Civil Action No. 16-948-JPG, U.S. District Court for the Southern District of Illinois, May 19)

A federal court in Ohio has dismissed Richard Jarrell's **Privacy Act** request to amend the medial records of his brother Stephen to reflect that he had received a medical discharge from the Army rather than "other than honorable discharge." Although Richard Jarrell argued that his own medical records were inaccurate, the crux of his action was to amend Stephen's medical records. The court found Richard did not have standing to accomplish that goal. The court noted that "plaintiff's allegations focus on Defendants' misuse of Plaintiff's altered medical records to deny Stephen's – not Plaintiff's – application to upgrade Stephen's discharge status. Defendants' denial was adverse to Stephen and concerned his military service and discharge, not Plaintiff's. Viewing it another way, if Defendants had granted Stephen's application, the resulting benefits would have inured to Stephen, not directly to Plaintiff. And although Plaintiff laudably advocated for and financially supported Stephen over the years, the proximate cause of this expensive endeavor was Plaintiff's voluntary choice to do so rather than Defendants' denial of Stephen's application to upgrade his Army discharge status in April 1990." (*Richard Maurice Jarrell v. Army Review Board Agency, et al.*, Civil Action No. 19-00349, U.S. District Court for the Southern District of Ohio, May 5)

The Supreme Court has ruled that Georgia may not claim a copyright in the Official Code of Georgia Annotated. After Georgia refused to allow PublicResource.Org to reprint state law because of its copyright claim, PublicResource.Org sued. The district court sided with the State, but the Eleventh Circuit reversed, finding that Georgia could not copyrights its laws. The Supreme Court agreed with the Eleventh Circuit, although on different grounds. Writing for an odds fellow majority that included Justices Sotomayor, Kagan, Gorsuch, and Kavanaugh, Chief Justice Roberts explained that "we have previously applied the [government

edicts doctrine] to hold that non-binding, explanatory legal materials are not copyrightable when created *by judges* who possess the authority to make and interpret the law. We now recognize the same logic applies to non-binding explanatory legal materials created *by a legislative body* vested with the authority to make law. Because Georgia's annotations are authored by an arm of the legislature in the course of its legislative duties, the government edicts doctrine puts them outside the reach of copyright protection." (*Georgia, et al. v. PublicResource.Org, Inc.*, No. 18-1150, U.S. Supreme Court, Apr. 27)

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