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Washington Focus: The Department of Justice's Office of Information Policy issued guidance May 30 on how agencies should deal with processing FOIA requests during the pandemic. OIP guidance noted that "under current circumstances, agencies may find a need for new technology not previously contemplated to support their FOIA administration. Under the maximum telework and physical distancing policies, agencies should to the extent feasible explore how technology solutions may assist them in continuing the operations of their FOIA programs."

Court Distinguishes Form from Format But Finds TSA Failed to Consider Burden

In another episode in the continuing litigation between Sai and the Transportation Security Administration concerning his multiple FOIA requests to the agency pertaining to his interactions with agency personnel at both San Francisco and Boston Airports, Judge Randolph Moss continues to explore the limits of an agency's obligation to provide records in the format chosen by the requester, particularly the agency's obligation to provide records in their native format. Because these issues are rarely the focus of litigation, Sai's case is likely to become the first in-depth discussion of the parameters of agencies' obligation to provide records in available formats that differ from those typically used when managing or disclosing records.

Moss began his analysis by noting that Congress had added provisions in the 1996 EFOIA Amendments clarifying and expanding FOIA's coverage of electronic records, including a provision that agencies must provide records in the requester's choice of format if they were "readily producible." Moss pointed out that "the word 'readily' signifies 'that an agency is relieved of the obligation to fulfill a format request that is onerous,' but courts assess what is 'onerous' keeping in mind the E-FOIA's requirement that agencies 'take affirmative steps towards maintaining records in 'reproducible' format such that they are 'readily reproducible' when sought out by FOIA requesters." In three of Sai's six FOIA requests he asked for records in "electronic, machine-processible, accessible, open and well-structured format to the maximum extent possible," including "individual PDFs per distinct

document," "fully digital text PDFs rather than scans or rasterizations," "digital redaction rather than black marker," "lists and structured data as machine-processible spreadsheets," and "scans rather than paper copies." Moss noted that one of Sai's primary concerns regarding his format requests was whether the agency was required to provide distinct PDFs as opposed to conglomerated PDFs containing multiple records. Moss observed that Sai was using the mathematical term "discretization" to mean "distinct files from distinct documents." This meant, Moss explained that "in the present context, discretization would require ten distinct PDF files for ten distinct documents, for example, as opposed to a single PDF file containing all ten documents merged."

After reviewing the provisions added by the EFOIA amendments pertaining to formats, including the addition of "electronic format," in the amended definition of record, Moss noted that "the Court has no doubt that the plain meaning of 'form or format' reaches beyond the choice of media. Indeed, had Congress intended to reach only the requested media – *e.g.*, paper, CD-ROM, microfiche, computer tape, or thumb drive – it might have simply referred to the 'form' in which the records were maintained or released. To be sure, the Committee Report on the E-FOIA often uses the terms 'form' and 'format' interchangeably, at times referring to an 'electronic format,' and at other times speaking of an 'electronic form.' But, where possible and consistent with other textual clues, courts endeavor 'to give meaning to every word' of a statute and to avoid redundancy. The court can do so here by construing 'form' to refer to the media – *e.g.* paper or thumb drive – and construing 'format' to refer to the electronic 'structure for the processing, storage, or display' of data – *e.g.* PDF or JPEG."

But Moss indicated that "this interpretation of the E-FOIA is also consistent with the tenet that nothing in FOIA requires the responding agency to 'arrange responsive records in [a] particular order.' Imposing such a duty for electronic records would dramatically expand the demands that the FOIA imposes on federal agencies with no indication that Congress intended to make such a fundamental change to the law or that it intended to impose an obligation with respect to the release of electronic records that does not exist for paper records. Congress intended to increase access to electronic records in all types of media (*e.g.*, tapes, microfiche, thumb drives) and in all types of format (*e.g.*, PDF, JPEG). Sai's request, however, takes the E-FOIA a step further, with no textual or other evidence that Congress intended that result." Applying those principles, Moss observed that "the Court is unconvinced that Sai's Policies Request for distinct or discretized PDF files, as opposed to a single file containing multiple documents constitutes a request for records in a 'form or format' different from that the TSA supplied."

Sai had requested records in their native format, such as Word, Excel or electronic PDF. The agency told Moss that because it processed all FOIA records by using FOIAXpress, it was unable to provide such records except by turning them into static PDFs. Citing *Public.Resources.org v. IRS*, 78 F. Supp. 3d 262 (N.D. Cal. 2015), in which the district court ruled that the IRS had not shown that spending $6,000 to write software that would allow it to turn static PDFs containing Form 990 documents on non-profits back into their original Modernized E-file format would constitute an undue burden, Moss found that TSA had still not shown whether providing non-rasterized PDFs – which refers to the number of pixels contained in the copy – would be unduly burdensome under the circumstances. He pointed out that "although the [agency] declaration asserts that the TSA is unaware of a method of producing secure redactions within a non-rasterized PDF, it does not represent that it made any effort to explore whether such a method exists or to quantify the increased risk of potential countermanding of redactions realized outside FOIAXpress." As a result, Moss concluded that "the TSA has failed to proffer 'specific, compelling evidence as to significant interference or burden' imposed on the agency by releasing records to Sai as the requested non-rasterized PDFs." Noting that the case law was undeveloped, Moss allowed TSA to present more evidence, indicating that "it should provide the Court with an expert declaration addressing the technical feasibility of the request, the *specific* cost (in dollars) and burdens (in time) of satisfying the request, the extent of the necessary redactions, and the security

risks, if any, posed by using Adobe Acrobat, as Sai suggests, or some other software to release redacted, non-rasterized versions of the records at issue."

In defending the adequacy of its search, TSA argued that by not reaffirming his interest in records pertaining to his requests on how his FOIA requests had been processed he had narrowed the scope of the requests. But Moss pointed out that "this history does not relieve TSA of its obligation to conduct a reasonable search for the records reasonably identified in the FOIA requests. The clarification process provides requesters and agencies a means of clearing up ambiguities in a request. But the Court cannot concluded that a requester has forfeited a portion of their FOIA request simply by failing explicitly to request it in responding to an invitation to 'provide as much information as possible to enable the FOIA Branch to locate the records being sought.' To adopt such a regime would give requesters a disincentive to work with the agency to clarify their requests for fear of inadvertently forfeiting legitimate components of their initial FOIA request by failing to reassert the initial requests in their entireties. And it would limit 'FOIA's purpose of shedding light on the operations and activities of government,' by providing opportunities for agencies to engage in gamesmanship to limit the scope of FOIA requests." (*Sai v. Transportation Security Administration*, Civil Action No. 14-403 (RDM), U.S. District Court for the District of Columbia, May 29)

Views from the States

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

Arkansas

A court of appeals has ruled that the trial court erred in dismissing Ben Motal's complaint against the City of Little Rock Police Department for refusing to allow him to inspect and copy a report of an accident in which he was involved by photographing the report with his cellphone. Instead, the police department told him that while he could inspect the report, he could only obtain a copy of the report by paying a $10 fee. Motal refused and filed suit instead, arguing that the police department had violated his right to inspect and copy the record. The police department then provided Motal a copy of the report and waived the $10 fee. The City argued before the trial court that its action had made the issue moot. The trial court agreed and Motal appealed to the court of appeals. Addressing the mootness issue, the appeals court indicated that since the City had a prohibition against the use of cellphone cameras, the issue fell within the public interest exception to mootness when ruling on an issue would prevent future litigation. The appeals court pointed out that "whether a citizen has an independent right to make a copy of an accident report by taking a digital photograph with his or her cell phone is a matter of substantial public interest, and our decision would prevent future litigation over such an issue." Having decided that the issue was not moot, the appeals court went ahead and looked at the merits. The appeals court noted that "we hold that in keeping with our mandate to interpret FOIA liberally to accomplish the purpose of promoting free access to public information, the term 'copy' should be liberally interpreted to include the taking of a photograph." (*Ben Motal v. City of Little Rock*, No. CV-19-344, Arkansas Court of Appeals, May 13)

New York

A court of appeals has ruled that the New York Department of Health properly withheld raw data contained in the New York marriage index from 1965 to 2016 in response to a request from the genealogical group Reclaim the Records because disclosure would constitute an invasion of privacy. The appeals court

acknowledged that marriage licenses were available from localities but went on to explain that disclosure of an aggregation of such data would cause an unwarranted invasion of privacy. The appeals court observed that "we assume that petitioners' stated purpose in obtaining marriage indices – to publish the records and enable the creation of a searchable database free on the Internet for genealogical research – is a legitimate public interest. We are mindful, however, of the underlying purpose of FOIL – to promote transparency in governmental operations so that the 'process of governmental decision making' is on display and governmental activities can be more readily scrutinized. It is difficult to fathom how that fundamental and salutary objective will be furthered by the release of information sought by petitioners. Indeed, in balancing the privacy and public interests at stake, contrary to the conclusion reached by [the trial court], we find that respondent has demonstrated that compelling privacy interests are implicated in the disclosure of personal information related to recent marriages of private persons and, further, that these interests carry more weight than the public interest that would be served by disclosure." Persuaded by the agency's claims that the information could be used for identity theft, the appeals court noted that "petitioners have not shown that the requested disclosure is required to serve the public interest and, more to the point, respondent has persuasively demonstrated that such disclosure 'would be offensive and objectionable to a reasonable person of ordinary sensibilities' whose personal, marital information would be disclosed and published." The court added that "indeed, the Internet was not even widely available until recent decades, and parties marrying in the 1960s through the 1990s could not have imagined this widescale dissemination of their personal information in this manner." (*In the Matter of Tammy A. Hepps, et al. v. New York State Department of Health*, No. 529148, New York Supreme Court, Appellate Division, Third Judicial Department, Apr. 30)

North Carolina

The supreme court has ruled that disciplinary records of students at the University of North Carolina at Chapel Hill who have been found to have violated UNC-CH's sexual assault policy are public records that must be disclosed to a coalition of state media because they fall within an exception to the non-disclosure restrictions contained in the federal Family Educational Rights and Privacy Act. In response to requests from local media for the disciplinary records, UNC-CH claimed they were protected under FERPA as exempt student education records. After the media coalition filed suit, the trial court ruled in favor of the university, finding that FERPA's provisions protecting student education records qualified as an exception "otherwise specifically provided by law" and that the federal statute acted as a preemption to state laws like the North Carolina Public Records Act. However, the court of appeals found that because the Public Records Act allowed disclosure of any non-exempt records, the exception in FERPA, allowing disclosure of disciplinary records where the results had been made public, applied and allowed for disclosure. The court of appeals' decision was appealed to the supreme court which upheld the appeals court's ruling. The supreme court noted that "officials of the University of North Carolina at Chapel Hill are required to release as public records certain disciplinary records of its students who have been found to have violated UNC-CH's sexual assault policy. The University does not have discretion to withhold the information sought here, which is authorized by, and specified in, the federal Family Educational Rights and Privacy Act as subject to release. Accordingly, as an agency of the state, UNC-CH must comply with the North Carolina Public Records Act and allow plaintiffs to have access to the name of the student, the violation committed, and any sanction imposed by the University on that student in response to plaintiffs' records request." (*DTH Media Corporation, et al. v. Carol L. Folt, et al.*, No. 142-PA-18, North Carolina Supreme Court, May 1)

Pennsylvania

A court of appeals has ruled that the Office of Open Records appropriately relied on affidavits submitted by Edinboro University to explain its processing of requests from *Pittsburgh Post-Gazette* reporter Bill Schackner concerning records pertaining to discussions between the university and A Bridge to

Independence, an attendant care/disability services provider, which was awarded a contract with Edinboro to provide services. After the university withheld records under the internal deliberative process privilege, the non-criminal investigation exemption, and the Federal Educational Rights and Privacy Act, Schackner filed a complaint with OOR, arguing that the university had failed to search for emails mentioning Ronald Wilson, director of social equity at the university, and challenging the university's exemption claims. The court found that the university had failed to show that searching for emails pertaining to Wilson was too vague, noting instead that "we anticipate that use of a name as a search term, as well as a sender/recipient, may include records that are not germane to University activities. However, combined with the fact that the Requests identified 15 senders/recipients over a reasonable timeframe, the keywords provide sufficient parameters to enable the University's response." The court indicated that discussions between the university and ABI qualified as pre-decisional and deliberative both before and after ABI was hired as a contractor. But the court observed that Schackner's second request "sought records *pre-dating* ABI's hire. Communications among University employees and agents regarding the outsourcing of attendant care services to prospective contractors (like ABI) under this exception as they reflect internal deliberations of the hiring decision *pre*-hire. By contrast, communications to and from the prospective contractors are not similarly exempt since they are not 'internal' until the contractor becomes an agent." Schackner argued that an agency must have a law enforcement purpose in its enabling statute to allow it to claim the noncriminal investigation exemption. The court disagreed, noting that "the University's investigation into sexual misconduct claims qualifies as an official inquiry for purposes of the noncriminal investigative exception." Rejecting the university's claim that FERPA applied to protect some records, the court pointed out that "the University did not establish that the records at issue are maintained by the University in files directly related to students under FERPA. Moreover, the University also alleged only the *possibility* of the loss of federal funding; this does not suffice." (*Bill Schackner, et al. v. Edinboro University*, No. 785 C.D. 2019, No. 786 C.D. 2019, and No. 809 C.D. 2019, Pennsylvania Commonwealth Court, Apr. 27)

A court of appeals has ruled that the Office of Open Records erred when it found that Kapsch TrafficCom North America, which had provided a proposal for a Cashless Tolling System and Maintenance Project for the Pennsylvania Turnpike Commission, had failed to substantiate its claims that much of the proposal contained confidential proprietary information and ordered it disclosed in response to a Right to Know Law request. Kapsch retained new counsel which argued that the company had not been informed of the OOR complaint until several days before OOR had ordered its proposal disclosed. The court agreed that OOR had provided too little time for Kapsch to pursue its confidentiality claim before ordering disclosure of its proposal. Ordering OOR to reconsider Kapsch's claims, the court noted that "because the OOR violated Kapsch's due process rights by failing to provide it a meaningful opportunity to be heard, the OOR's decision to deny the petition for reconsideration both misapplied the law, and was 'contrary to the. . .established rules of law.'" (*Pennsylvania Turnpike Commission v. Electronic Transaction Consultants Corporation*, No. 174 C.D. 2019 and No. 188 C.D. 2019, Pennsylvania Commonwealth Court, Apr. 29)

The Federal Courts…

After holding a rare two-day trial, Judge Amit Mehta has ruled that U.S. Immigration and Customs Enforcement has finally shown that **Exemption 7(E) (investigative methods and techniques)** applies to some data elements in its databases pertaining to the detention of undocumented immigrants. Susan Long and David Burnham, co-directors of the Transactional Records Access Clearinghouse, submitted requests for aggregate data from the Enforcement Integrated Database (EID) and the Integrated Decision Support Database

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(IIDS). Although the agency had provided the aggregate data TRAC requested with all the requested data elements in the past, ICE eventually took the position that disclosure would allow someone to hack its systems and harm its ability to protect the data. However, in several prior opinions, Mehta had found that ICE had not justified the low bar required under Exemption 7(E) and finally ordered a trial with witnesses. Acknowledging the low bar for invoking Exemption 7(E), Mehta observed that "even when an exemption broadly applies, however, an agency nevertheless must 'tailor' its withholdings to only that which the exemption protects." For the first time at the evidentiary hearing, ICE confirmed that it was possible to access the two databases remotely. With this knowledge, Mehta explained ICE's asserted risk as being tied to "the *additional* damage a hacker might cause once he gains unauthorized access to the EID and IIDS if it has advance knowledge of the metadata and database schemas – not the danger that he will gain access in the first place by successfully managing to subvert the [trusted internet connection] and traverse any security measures intended to protect those databases. In this case, that additional harm might consist of viewing, modifying, or deleting sensitive law enforcement information related to ICE's enforcement duties, and possibly even erasing any evidence that the databases were attacked or otherwise compromised." TRAC argued that the agency's current security measures were adequate to protect the databases and even if a would-be hacker gained access to the databases, advance knowledge of the metadata and database schema would not aid the attacker in doing any damage. Mehta rejected both arguments. He noted that "while the evidence adduced at the evidentiary hearing demonstrates that there are security countermeasures in place to prevent a hacker from gaining access to the system, nowhere was it credibly suggested that access is impossible." As to whether advance knowledge of the database schema would aid a hacker, Mehta pointed out that the agency's witness "credibly testified that advance knowledge of this information would assist a hacker in launching a more targeted and effective attack that is less likely to be detected by the agency. Plaintiffs' own expert acknowledged that advance knowledge of the metadata and database schema could make *some* difference in an attack by enabling an attacker to recreated the database to practice his attack This advance knowledge, [TRAC's expert witness] conceded, could reduce the number of queries necessary for a hacker to accomplish his attack, thereby making the attack more efficient." Finding ICE's testimony persuasive, Mehta observed that "the court finds that there is a material risk that comprehensive knowledge of the organization of the databases could enable a bad actor to execute an attack undetected. FOIA Exemption 7(E) does not countenance such risk." However, Mehta agreed with TRAC that ICE had not considered whether non-exempt data could be segregated and disclosed. He pointed out that "the court is satisfied that the database schema (which, by definition, describes the structure of ICE's databases) presents a material risk [if disclosed]. But the other categories of information requested by Plaintiffs – field and table names, codes, code translations, and code lookup tables – do not appear to uniformly pose such a risk." TRAC had a third FOIA request still in dispute because ICE had not provided sufficient information as why disputed data elements should be withheld. Mehta told ICE to provide further justification to resolve the remaining issues pertaining to that FOIA request. (*Susan B. Long, et al. v. Immigration and Customs Enforcement, et al.*, Civil Action No. 14-00109 (APM), U.S. District Court for the District of Columbia, June 2)

After his 2019 decision finding that the National Security Commission on Artificial Intelligence was subject to FOIA, Judge Trevor McFadden has ruled that the Commission is also subject to the **Federal Advisory Committee Act**. In so ruling, McFadden rejected the government's argument that an entity could not be subject to both but was either an agency for purposes of FOIA or an advisory committee for purposes of FACA. While FACA, passed by Congress in 1972, was meant to bring access rights to federal advisory committees that were created to provide advice to agencies on various subjects, and thus played an important role in agency policy-making, but were not subject to FOIA because they were not agencies. Nevertheless, FACA and FOIA have a number of similarities. Although FACA establishes a notification process for advisory committee meetings, as well as access rights to records prepared as part of that process, it also provides rights of access to advisory committee records after an advisory committee's records has been

created and even after the work of an advisory committee has been concluded. FACA's records exemptions track those of FOIA, although they do not include the privileges encompassed in Exemption 5 (privileges). McFadden admitted that part of the reason he concluded that the AI Commission was subject to FACA was that his ruling on its agency status was based on a literal reading of the definition of agency in FOIA itself. In the original FOIA, Congress indicated that an agency for purposes of FOIA had the same definition as did § 701(b)(1) of the Administrative Procedure Act, which defines agency as "each authority of the Government." But in 1974, Congress expanded that definition to include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of government (including the Executive Office of the President), or any independent regulatory agency." Addressing these crucial differences, McFadden explained that his prior opinion "did not hold that the Commission was an 'agency' under § 701(b)(1). It held only that the Commission is an 'agency' for purposes of FOIA [§ 552(f)(1)]." McFadden noted that "the upshot is that if an entity fits one of the categories in § 552(f)(1) – such as 'establishment in the executive branch' – it will not necessarily qualify as an 'authority of the Government' under § 551(1) or § 701(b)(1). Congress thus allowed for something to be an 'agency' under § 552(f)(1) but *not* an 'agency' under § 551(1) or § 701(b)(1). In other words, because of the 1974 amendments, all APA agencies are FOIA agencies, but not vice-versa." McFadden spent much of his opinion disabusing the government of its claim that the AI Commission was an agency for purposes of the APA. Instead, he pointed out that "the Commission does not exercise 'substantial independent authority.' The upshot is that the Commission is an 'agency' under § 552(f)(1) but *not* an 'agency' under § 551(1) or § 701(f)(1), exactly the sort of entity Congress intended to capture when it expanded FOIA's definition of 'agency' in 1974." He then turned to the issue of whether the AI Commission was subject to FACA. He concluded that it was, noting that "the language that Congress used to create the Commission matches FACA's definition of 'advisory committee.' And Congress twice declined to excuse the Commission from FACA, even though both laws carved out FACA exemptions for other entities. The Court thus concludes that the Commission is an 'advisory committee' subject to FACA." McFadden rejected the government's claims that there were irreconcilable differences between FOIA and FACA which meant they could not co-exist. He also agreed with the plaintiff EPIC that the staff available to the AI Commission were more like intermittent employees than like full-time or part-time employees; an advisory committee is not subject to FACA if it is made up entirely of federal employees. (*Electronic Privacy Information Center v. National Security Commission on Artificial Intelligence, et al.*, Civil Action No. 19-02906 (TNM), U.S. District Court of the District to Columbia, June 1)

Judge Tanya Chutkan has ruled that Department of Justice properly separated segments of email chains based on their responsiveness to CREW's requests for records concerning the decision to disclose text messages sent between former FBI employees Peter Strzok and Lisa Page during the 2016 presidential campaign to reporters in December 2017. In processing CREW's requests, the Office of Information Policy ran into data migration problems caused by transfers to new servers. CREW faulted OIP for failing to explain the data migration issue sufficiently to allow it to assess and challenge it. Chutkan disagreed, noting that "though OIP does not go into detail about the nature of the data problem, this description reasonably assures the court that the original search (with which CREW takes no issue) was run against a complete data set. OIP has thus met its burden to 'show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" OIP and the Office of Inspector General had divided each email into separate records, allowing it to withhold certain emails as non-responsive to CREW's requests. CREW argued this was contrary to *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the D.C. Circuit ruled that agencies could not withhold records because they were non-responsive but instead had to make an applicable exemption claim. In *AILA*, the D.C. Circuit indicated that records could be subdivided

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but explained that agencies probably could not justify redactions of individual sentences. CREW argued that dividing the records into individual emails was also too narrow and that "a record must constitute only 'the full native form in which it is maintained by the agency at the time of the request.' This means that if an agency stores emails in threads (as CREW asserts DOJ does), then the full thread, and nothing less, is the 'record.'" Chutkan rejected CREW's claim, noting that "the statute's description of a record is preceded by the word 'includes,' which CREW omits from its quotation of the text. "'Includes' suggests that the statute seeks not to narrow or limit what counts as a record, but to expand it. As CREW itself points out, Congress added this language 'to ensure that electronic records, in addition to paper documents and other tangible objects, were covered.' Thus, the clause does not narrow the range of what counts as a record; it expands it." CREW argued that the addition of the phrase "when maintained by the agency" in the statute's definition of record, supported its position that a record is defined by the manner in which an agency stores it. Chutkan, however, pointed out that "but even if CREW is correct that the statute gives specific meaning in the word 'record' (and the D.C. Circuit is mistaken in noting that it provides 'little help'), then that specific meaning describes what is to be *included* in the definition of a record. The statute does not say that all other types of records are *excluded*. In other words, CREW's argument, at best, speaks to what the statute includes, it says nothing about what types of records the statute excludes." CREW contended that its definition would provide objective criteria and not depend on the requester's intent or the agency's interpretation of that intent. Chutkan agreed but noted that "unless that test is found within the statute, the court cannot enforce it. If CREW seeks to have a 'record' defined by the manner in which it is maintained by the agency, 'its concerns are properly directed to Congress, not this court.'" Chutkan explained that the D.C. Circuit in *AILA* had included in dicta some limits on dividing records. The *AILA* decision indicated that "we find it difficult to believe that any reasonable understanding of a 'record' would permit an individual sentence within a paragraph within an email on the ground that the sentence alone could be conceived of as a distinct, non-responsive record.'" Chutkan observed that "after all, thought the statute give little content to the words 'agency record,' those works have their own meaning, and calling a sentence in an email, or a word in a sentence, 'a record' stretches that meaning too far." Turning to DOJ's decision to divide the emails into separate records, Chutkan noted that "here, DOJ's definition of a record, given the language of the request and the documents in question, does not stretch past the bounds of reasonableness." (*Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, Civil Action No. 18-007 (TSC), U.S. District Court for the District of Columbia, May 26)

Judge Amy Berman Jackson has ruled that U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection improperly redacted identifying information from Excel spreadsheets the agencies provided to the American Immigration Council in response to its requests for database records concerning individuals who were apprehended , encountered, or removed from the United States between January 2016 and October 2017. Both agencies provided spreadsheets but ICE withheld birth dates of individuals while CBP withheld 13 of the 27 data elements requested by AIC. Both agencies cited **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** as the basis for the withholdings. Noting that birthdates enjoyed only a *di minimis* privacy interest and that there might well be an articulable public interest in the disclosure of such information under the circumstances, Berman Jackson split the difference. She pointed out that "the Court finds that there is no genuine dispute that the government can adequately protect whatever minimal privacy interests the detainees have in their birthdates by redacting the date but not the month and the year, because the agency has not identified any harm that would flow from a more limited disclosure, and the statute requires that reasonably segregable portions of documents should be provided." Both agencies withheld unique identifiers but for different reasons. ICE claimed that providing the information would force it to make interpretative assumptions that were required under FOIA while CBP claimed its identifiers were properly withheld under **Exemption 7 (E) (investigative methods and techniques)**. Berman Jackson agreed with ICE that it was not

required to create new records but found instead that ICE could have found more responsive data elements by searching other databases. Berman Jackson explained that "because ICE has produced data from [its Enforcement Integrated Database] in a recent case and its own declarant acknowledged that person-centric unique identifiers are reasonably likely to be found in EID, a genuine dispute of fact exists about whether ICE made a 'good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" She rejected CBP's Exemption 7(E) claim, noting that "the agency has not come forward with information to show that the mere possession of unique identifying information would facilitate one's ability to hack into CBP's system or that it would make hacking more likely. In other words, the harm the exemption is designed to avert – the circumvention of the law – would not be caused or advanced by the disclosure of the data in question, and it depends upon the hypothetical commission of a crime that is independent of the disclosure of the data the defendant seeks to withhold." Berman Jackson upheld CBP's Exemption 7(E) claims related to other data elements. (*American Immigration Council v. U.S. Immigration and Customs Enforcement, et al.*, Civil Action No. 18-1614 (ABJ), U.S. District Court for the District of Columbia,
May 27)

Judge Colleen Kollar-Kotelly has ruled that the National Highway Traffic Safety Administration and the EPA **conducted adequate searches** in responsive to a 12-part FOIA request from the California Air Resources Board for the proposed rulemaking for the Safer Affordable Fuel-Efficient Vehicles Act and that two EPA email threads and two draft reports from the NHTSA were properly withheld under **Exemption 5 (privileges)**. Several subparts of CARB's FOIA request pertained to battery costs. NHTSA referred CARB to the Argonne National Laboratory (ANL) to obtain a copy of the battery model used. Neither the NHTSA nor the EPA had responsive records for some portions of the request, but both agencies withheld some records under Exemption 5. CARB filed suit, challenging the adequacy of the agencies searches and their exemption claims. As a preliminary defense, the agencies claimed that CARB's request was not a proper FOIA request but rather a request for answers to various questions. Kollar-Kotelly disagreed with the agencies' characterization, noting that "defendants are correct that part 8 [of the request] went on to contain a narrative description of the alleged shortcomings of Defendants' statistical model. However, construing Plaintiff's request liberally, that narrative portions does not negate Plaintiff's initial request for data. And the Court finds that such a request for data reasonably included documents containing such data." But Kollar-Kotelly rejected CARB's accusation that such a characterization constituted bad faith. Kollar-Kotelly rejected CARB's claims that the searches were inadequate, in part, since the agencies had failed to locate records that should exist. But Kollar-Kotelly pointed out that "plaintiff's bare speculation that other documents must exist is not sufficient to show that Defendant NHTSA's search was inadequate. Here, Defendant NHTSA's declarant indicates 'which files were searched, by whom those files were searched, and a systematic approach to document location.' The agency custodians indicated that no other locations were reasonably likely to contain responsive records." Kollar-Kotelly then found that the agencies' claim that withheld records were protected by the deliberative process privilege Exemption 5 were appropriate. She rejected CARB's claim that the issuance of a final rule meant that information was no longer pre-decisional. She observed that "the issuance of the final rule does not obviate the harm from disclosure. Disclosure would still risk confusion as to the Rule because the emails reflect EPA staff's initial opinions, not the final agency decision." (*California Air Resources Board v. United States Environmental Protection Agency, et al.*, Civil Action No. 19-965 (CKK), U.S. District Court for the District of Columbia, June 3)

Judge Tanya Chutkan has ruled that the Department of Justice failed to **conduct an adequate search** for records concerning the request from Commerce Secretary Wilbur Ross to include a citizenship question on

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the 2020 census form and has both accepted and rejected **Exemption 5 (privileges)** claims made by various DOJ components in responding to requests from the Campaign Legal Center. After media reports indicated that Ross had asked then Attorney General Jeff Sessions to provide a legal justification for including the citizenship question on the 2020 census. CLC submitted a request to the Civil Rights Division (CRT), the Justice Management Division (JMD), and the Office of the Attorney General (OAG) for records concerning Ross' request for the citizenship question. The CRT referred the request to its Voting Section and searched the Office of the Assistant Attorney General (OAAG) as well. OAAG indicated that John Gore, a deputy assistant attorney general, who had worked on the citizenship question issue, was the only person likely to have responsive records. His email account was searched using the term "census." The CRT disclosed 69 pages in full or in part and withheld 42 pages in full under Exemption 5 and **Exemption 6 (invasion of privacy)**. The CRT subsequently released an additional 114 pages that had been inadvertently overlooked. It also processed 16 pages referred by the Office of Information Policy (OIP), releasing 12 pages in full and withholding two pages under Exemption 5. OIP processed the request for the OAG. CLC agreed to limit the number of search terms. OIP located 219 pages of responsive records and processed an additional 70 pages referred by JMD. Of those 289 pages, OIP withheld 91 pages in full and 21 in part under Exemption 5. JMD disclosed 116 pages with redactions and withheld five draft letters attached to responsive emails. CLC challenged the agencies' searches as well as its exemption claims. Chutkan agreed with CLC that the search conducted by the CRT was insufficient since it was limited to the term "census." Chutkan pointed out that "this court is mindful that an agency has discretion in how it conducts a FOIA search, and that 'in general, a FOIA petitioner cannot dictate the terms for his or her FOIA request.' But an agency's discretion 'is not boundless; the search terms selected must pass muster under a standard of reasonableness.' DOJ's use of a single search term for all the digital records does not pass muster under that standard. It is likely that responsive digital documents exist which do not have the word 'census' in them." Chutkan also rejected CRT's Exemption 5 claims. CRT withheld 23 pages of email correspondence dealing with notifying Congress of DOJ's request for a census citizenship question under the **presidential communication privilege**. Chutkan, however, pointed out that "DOJ does not assert, for example, that the President was involved in the communications or that the President viewed any of the documents related to the communications or that the communications related to advice to be given to the President." She observed that "absent these assertions, the privilege does not apply." CRT withheld a draft letter and emails pertaining to the draft letter. Chutkan indicated that the agency had failed to show that the letters were pre-decisional. She noted that "the letter at issue did not involve discretion about an agency position or about the primary reasons for the agency position. The agency's position and the reasons for the letter had already been decided." She added that "the draft was not provided to supervisors to help them make a decision. The decision had already been made and the supervisors were reviewing Gore's implementation of it." Chutkan agreed with other district court judges in the D.C. Circuit that press inquiries qualified for the deliberative process privilege if they were both pre-decisional and deliberative. Here, she noted that "the documents are pre-decisional because they were created before the agency responded to a press inquiry, and they are deliberative because they are 'part of the agency give-and-take of the deliberative process by which the decision itself is made.'" (*Campaign Legal Center v. U.S. Department of Justice*, Civil Action No. 18-1771, U.S. District Court for the District of Columbia, June1)

Judge Tanya Chutkan has ruled that the NIH **conducted an adequate search** for emails sent or received by two senior officials from May-July 2014 regarding maternal deprivation experiments conducted on rhesus macaques at NIH's Poolesville facility from People for the Ethical Treatment of Animals and that the agency properly withheld records under **Exemption 6 (invasion of privacy)**, but had not justified its claims under **Exemption 5 (privileges).** The agency searched the two officials' government and personal accounts for responsive records, locating 200 pages. NIH disclosed 72 pages in full and 30 pages in part and withheld 99 pages entirely under Exemption 5 and Exemption 6. Three months later, however, NIH changed

is position dramatically, insisting that 119 pages of the 200 total pages were non-responsive to the request and pulled those pages from the group of pages still in dispute. PETA argued that because of the agency's dramatic change in position, its *Vaughn* index was submitted in bad faith. Chutkan disagreed, noting that 'while it is unusual for an agency to change its findings about responsiveness the day before filing a motion for summary judgement, there is no authority – and PETA cites none – indicating that such action is prohibited or presumptively suspect. . .The fact that PETA disagreed with NIH's classification is not enough to undermine the presumption of good faith accorded to agency declarations." PETA argued that the agency's search was inadequate because the use of terms varied somewhat from office to office. But Chutkan noted that "here, NIH use the same core terms throughout and chose to augment them for certain searches." PETA challenged the agency's Exemption 6 redactions of personal emails, claiming such information was already publicly available. Chutkan pointed out, however, that "the fact that information 'is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" Citing a series of recent district court decisions accepting that the deliberative process privilege applied to press or Congressional inquiries, Chutkan rejected the NIH's claim that the privilege extended to queries from non-profits. She explained that "there are similarities between an agency's response to a press inquiry and an agency's response to a non-profit, but applying the privilege here, to a non-profit's request for a meeting, would certainly expand the scope of Exemption 5. If the privilege protected the process of responding to such a request, there would be no limiting principle preventing expansion of the privilege to protect the preparation of all agency communication with outside entities. This court declines to initiate such an expansion because HHS bears the burden of establishing the privilege by a reasonable certainty, and because Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" (*People for the Ethical Treatment of Animals v. Department of Health and Human Services*, Civil Action No. 17-1395 (TSC), U.S. District Court for the District of Columbia, June 1)

A federal court in New York has ruled that the Department of Justice failed to **conduct an adequate search** for records related to the government's attempts to include a citizenship question on the 2020 census in response to a FOIA request from the NAACP Legal Defense & Education Fund. The Civil Rights Division at DOJ initially told LDF that the records were protected by **Exemption 7(A) (interference with ongoing investigation or proceeding)**. However, the Civil Rights Division ultimately made four separate responses, disclosing 178 pages in full or in part and withholding 63 pages entirely. LDF filed suit and Judge Alison Nathan indicated she was prepared to address the adequacy of the agency's search. Nathan found that the agency's search of the census collection database was inadequate because it used only the term "census." Nathan pointed out that "while DOJ has discretion to develop search terms reasonably tailored to [a subpart] of LDF's request, its explanation for why it used *only* this search term to search for records responsive to this subpart is illogical and thus insufficient. It alleged only that is used the term 'census' 'to compile the larges data collection to locate all documents responsive to [the subpart of LDF's] request. But it does not further *explain* why or how use of only this term would succeed in compiling the 'largest possible data collection' of documents potentially responsive to [the subpart] of LDF's request. Nor does it account for the fact that search for the term 'census' *leaves out* all of the documents responsive to this subpart of LDF's request that discuss the citizenship status question as necessary to enforce Section 2 of the Voting Rights Act but does not explicitly mention the word 'census.'" Nathan also found the agency had failed to justify why it limited its search to certain offices. DOJ argued that FOIA did not obligate it to search all potentially responsive databases. Nathan agreed in principle, but noted that "however, it is not the failure to conduct electronic searches in and of itself that renders these searches inadequate; rather. . .it is the failure to search *all* locations – including the census collection database – 'likely to contain responsive records.' In this instance, then the need to conduct electronic searches is only precipitated by the fact that the location likely to contain

responsive records is an electronic database." (*NAACP Legal Defense & Education Fund, Inc. v. Department of Justice*, Civil Action No. 18-9363 (ALN), U.S. District Court for the Southern District of New York, May 29)

Judge Tanya Chutkan has ruled that the FBI has so far failed to show it properly responded to two FOIA requests from retired FBI agent Jeffrey Danik for emails and text messages sent by former acting director Andrew McCabe. Although Danik's requests listed 23 search terms, the agency only used six of the terms, claiming the rest of the terms were too broad. The agency located 178 pages and disclosed 169 pages in full or in part. The FBI argued that many of McCabe's text messages did not qualify as **agency records** because of their limited internal dissemination. However, Chutkan pointed out that "a document with limited distribution, like an email between two people reflecting an agency decision, can be an agency record." She also indicated that "the FBI has not shown whether it retained McCabe's text messages in its files." Chutkan then rejected the FBI's claim that it had considered most of Danik's proposed search terms and found they were too broad and that a search would be **unduly burdensome**, based on its review of one term that had yielded 20,000 potential hits. Chutkan found the agency's claim fell short, noting that "the FBI assumes, without running the searches, that the remaining terms would generate a similar number of hits and require similar hours to review. But it has no factual basis to assume that all the terms, which include 'until I return' and 'New York Times' would generate a similar number of hits." Chutkan also rejected the agency's claim of **Exemption 5 (privileges)**. The agency's explanation for withholding several documents combined the chilling effect under the deliberative process privilege with reference to potential litigation. Finding this did not meet the agency's **foreseeable harm** standard, she observed that "the boilerplate language does not link the harm (chilled discussion and preparation of materials) to the specific information in the withheld materials. Therefore, the explanation fails to establish foreseeable harm from disclosing the documents." (*Jeffrey A. Danik v. U.S. Department of Justice*, Civil Action No. 17-1792 (TSC), U.S. District Court for the District of Columbia, May 31)

Judge Timothy Kelly has ruled that the DEA **conducted an adequate search** for records in response to a request from Barbara Kowal, a paralegal at the Federal Defender for the Middle District of Florida, for records concerning Daniel Troya, a capital defendant that the Federal Defender was representing in his post-conviction hearing, and several of Troya's co-defendants. The agency located 418 pages responsive to Kowal's request and disclosed some heavily redacted records with multiple exemption claims. Kowal challenged the adequacy of the agency's search, arguing that the DEA had not used Troya's known alias and that its search had failed to produce any of the 200 items she already had in her possession. Kelly noted that the agency's primary database "only indexes individuals by name, Social Security Number, or date of birth so a search by name and birth date is 'reasonably calculated to uncover all relevant documents.' While including the alias – if that was even technically feasible – might have made the search even more thorough, omitting the alias did not make the search unreasonable, especially considering the 'unique, identifying terms already used.'" Kelly indicated that the fact the Kowal had other items about Troya did not undermine the reasonableness of the agency's search. He pointed out that "she has not explained why, merely because *she* has them, *DEA* must also still have them such that it could produce them in response to a FOIA request. Thus, the items themselves do not show that the search was inadequate. The DEA may simply not have them, or, even if it does 'a reasonable and thorough search may have missed them' for whatever reason." Kelly agreed with Kowal that the agency's *Vaughn* index was insufficient. He observed that "on this record, the Court has no way to tell which portions of the document DEA asserts are subject to which exemption or combination of exemptions. The Court must be able to understand with more particularity which portions the DEA seeks to withhold under the various exemptions claimed." (*Barbara Kowal v. United States Department of Justice, et al.*, Civil Action No. 18-938 (TJK), U.S. District Court for the District of Columbia, June 1)

Judge Randolph Moss has ruled that the Department of Homeland Security **conducted an adequate search** in response to a request from Lori Shem-Tov, a journalist who was being prosecuted in Israel for "insulting public officials," and that its exemption claims, with the exception of a withholding made under **Exemption 7(D) (confidential sources)** were appropriate as well. Through her attorney, R. David Weisskopf, Shem-Tov submitted FOIA requests to DHS, the Department of Justice, and Interpol Washington for records concerning Israel's request for records related to data from WordPress.com, pursuant to Article 7 of the Treaty on Mutual Legal Assistance in Criminal Matters. Interpol Washington located 72 responsive pages, disclosing 45 pages with redactions made under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and Exemption 7(D). Interpol Washington also referred 16 pages to DHS for its determination. Shem-Tov challenged the adequacy of the agencies' searches. Moss found the searches done by both Interpol Washington and U.S. Immigration and Customs Enforcement were adequate, pointing out that ICE's affidavit provided a "reasonably detailed account of the DHS search, including the specific DHS subdivision searched, the file location searched, and the search terms used, establishes that DHS conducted a search reasonably calculated to discover all records responsive to Plaintiff's FOIA request." Turning to the exemptions, Moss rejected Shem-Tov's claim that Interpol's records were not collected for law enforcement purposes because she had already been indicted by Israel before the records were created. Instead, Moss noted that Shem-Tov was confusing the threshold for invoking Exemption 7(A) (ongoing investigation or proceeding) with the separate issue of whether a law enforcement agency's records were compiled for law enforcement purposes. Moss observed that "the records compiled need not be associated with an 'ongoing law enforcement investigation' for the FOIA law enforcement exemptions invoked here, which do not include Exemption 7(A), to apply." He added that "simply because Plaintiff has already been indicted and was detained pre-trial does not mean that the Israeli law enforcement proceedings against her 'ended over two years ago' and are not ongoing." Interpol Washington had made some redactions under Exemption 7(D). Moss found the agency's explanation of those withholdings was too sparse. He pointed out that "it says nothing, for example, about whether a foreign [bureau] that is *seeking* information from the [U.S. bureau] or from U.S. law enforcement agencies constitutes a confidential *source* that has 'furnished information.'" (*Lori Shem-Tov v. Department of Justice, et al.*, No. 17-2452 (RDM), U.S. District Court for the District of Columbia, May 25)

Judge Ketanji Brown Jackson has ruled that the Executive Office for U.S. Attorneys properly responded to prisoner Richard Glawson's FOIA request for records concerning the grand jury instructions and the commencement, termination, and extension dates for the grand jury that indicted him on drug charges in the U.S. District Court for the Middle District of Georgia in 2005. The agency processed the request under both FOIA and the Privacy Act but found no records. Glawson filed suit, arguing that the agency had failed to **conduct an adequate search**. After reviewing the agency's search, Brown Jackson noted that "here, EOUSA has provided a declaration that describes first-hand the steps that were taken to locate the records at issue and it is clear from the description provided that the declarant not only 'identified and searched all locations [within the relevant databases] likely to contain responsive records' but went even further afield, seeking to follow up with the Grand Jury coordinator and search the office's grand jury records generally, in order to locate the documents Glawson requested. Given this undisputed description of the search that was conducted in response to Glawson's document request, this Court is fully satisfied that the agency's search was reasonably calculated to locate the responsive records for FOIA purposes." Glawson argued the agency failed to look in other locations that might house responsive records. But Brown Jackson observed that "an agency component like EOUSA is responsible for disclosing only those records the agency possesses and controls at the time of a FOIA or Privacy Act request. It has no obligation to search *beyond* its files, and it is not at all clear that EOUSA is even authorized to seek records from the clerk of court's files, given that federal courts are excluded from the reach of both the FOIA and the Privacy Act." Brown Jackson also rejected Glawson's claim that the agency was required to provide a *Vaughn* index. She pointed out that "a Vaughn index is a

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judicially approved tool for the agency to justify *its withholdings* under the FOIA, and there are no withholdings when the agency provides a no-records response to a FOIA request." (*Richard Glawson v. Executive Office for United States Attorneys*, Civil Action No. 18-2673 (KBJ), U.S. District Court for the District of Columbia, May 26)

Judge Colleen Kollar-Kotelly has dismissed the remaining counts in Matthew Dunlap's suit under the **Federal Advisory Committee Act** claiming access to records that he should have received as a member of the Presidential Advisory Commission on Election Integrity. Dunlap was appointed to the Commission in his role as Maine Secretary of State. After he realized that he had not received records that were available to other members of the Commission, Dunlap filed suit. In her first decision in 2017, Kollar-Kotelly found that Dunlap's suit could continue. However, the Commission was dissolved in January 2018. Because of that action, the government asked Kollar-Kotelly to reconsider her earlier 2017 decision, arguing that Dunlap's claims against the Commission were now moot. Kollar-Kotelly denied the government's motion for reconsideration and allowed Dunlap to pursue his claims. This time, Kollar-Kotelly agreed with the government that Dunlap had **failed to state a claim** for relief. Dunlap relied primarily on *Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999), where the D.C. Circuit ruled that Cummock had rights of access as a member of a FACA committee that were more expansive than those of third-party requesters. Three categories of records remained in dispute. Kollar-Kotelly indicated that none of them qualified as records to which Dunlap, as a commission member, would have been entitled. Instead, she observed that "while the memoranda were made available to the Vice President, they were made available to him not in his role as Chair of the Commission but instead his role as Vice President. Moreover, as they were not shared with any other members of the Commission or the Vice President in his role as a Commissioner, it is far from clear that these documents were or would have become part of the Commission's 'deliberative process' under *Cummock*. . .to which Dunlap might be entitled." (*Matthew Dunlap v. Presidential Advisory Commission on Election Integrity, et al.*, Civil Action No. 17-2362 (CKK), U.S. District Court for the District of Columbia, May 29)

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