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Washington Focus: A report published by the Office of the Inspector General for the Department of Homeland Security found that nearly four-fifths of FOIA suits filed against the agency are based on the agency's failure to respond within the statutory time limit. The IG report, which reviewed cases from 2013-2018, found that 79 percent of suits allege failure to respond on time. That ranged from a low of 23 days for filing a suit to a high of 478 business days. The report found that DHS took an average of 85 days to process complex requests. The report indicated that shortages of personnel and an increase in requests were cited as the main reasons for the delays with the number of annual requests per FOIA staff member increasing from 40 to 64 during that time.

Court Finds ODNI Declassification of List Constitutes Limited Official Acknowledgement

Judge Trevor McFadden has upheld *Glomar* responses neither confirming nor denying the existence of records issued by the National Security Agency and the Department of State in response to requests from the American Center for Law and Justice concerning alleged unmasking requests from senior officials in the Obama administration for various individuals associated with the 2016 Trump campaign after finding no evidence of official acknowledgement of any unmasking requests with the exception of the declassification of a list by then Director of Intelligence Ric Grenell identifying former UN Ambassador Samantha Power as having requested unmasking Michael Flynn's identity. In his ruling, McFadden re-emphasizes how difficult it is to turn media allegations into evidence of official acknowledgement capable of persuading a district court judge.

Based on an April 2017 report on Fox News that Susan Rice, who had served as National Security Advisor during the second term of President Barack Obama, had requested the unmasking of various individuals associated with the Trump presidential campaign whose personally identifying information showed up in government surveillance activities, ACLJ sent multi-part requests to the NSA and the State Department for records of unmasking requests by Rice, Cheryl Mills, Chief of Staff for Secretary of State Hillary Clinton, Valerie Jarrett, an advisor to Obama, Attorney General Loretta

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Lynch, and Ben Rhodes, Deputy National Security Advisor. Since Power had also been identified as having requested unmasking at the State Department, ACLJ added her name to the list of others submitted to the State Department. Both agencies issued *Glomar* responses based on Exemption 1 (national security) and Exemption 3 (other statutes). The State Department also withheld some records under Exemption 5 (privileges).

McFadden began by explaining that a *Glomar* response allowed an agency to refuse to reveal the existence of records if they were properly protected by an exemption and that if the response was appropriate the plaintiff had the burden of showing that the information had been officially acknowledged. McFadden indicated that "the question is whether the agency has acknowledged the *existence* (or nonexistence) of responsive records, *not* whether it has disclosed the *contents* of the records. If the agency has officially acknowledged the existence of records, it cannot assert a *Glomar* response for those records. Bereft of the *Glomar* shield, the agency has a decision to make, the same one it has in any standard FOIA case: either disclose the records or establish that their *contents* are exempt from disclosure."

McFadden rejected ACLJ's assertion that statements of former agency officials made after they left office can constitute an official acknowledgement. Instead, McFadden pointed out that "a 'disclosure made by someone other than the agency from which the information is being sought' is not an 'official' disclosure." He added that "courts have consistently found that statements made by former agency officials are not official agency disclosures." He observed that "it would be surpassing strange if an agency had to confirm the existence of records – and in doing so, compromise national security – simply because a private citizen no longer representing the agency forces its hand." He also rejected ACLJ's claim that Congress could waive *Glomar* responses. He pointed out that "but disclosures by members of Congress – much like disclosures by former agency officials – are also not official agency disclosures. A contrary rule would almost certainly raise significant constitutional problems, as this would invite congressional encroachment on the Executive's authority to control access to national security information."

However, McFadden agreed that the list of unmasking requests that was declassified and released by Grenell when he served temporarily as acting Director of National Intelligence constituted an official acknowledgement that waived the agencies' *Glomar* response, but only to the limited extent that Grenell's list identified Power as having requested unmasking for Michael Flynn. McFadden indicated that the government now took the position that the Grenell disclosure could waive the State Department's *Glomar* response. He explained that "the only question now is whether the Acting DNI's disclosure here *does* overcome State's (or NSA's) *Glomar* responses. Answering this requires close attention to exactly what the declassified memorandum discloses, for a *Glomar* waiver occurs only if the official disclosure 'matches. . . the specific request for that information.'" The government argued that Grenell's disclosure did not waive either agency's *Glomar* response while ACLJ asserted that the disclosure waived the State Department's *Glomar* response entirely and required State to process at least some of its records.

McFadden pointed out the "the Court rejects both positions. The disclosure is specific enough to establish the existence of *some* responsive records, but it waives State's *Glomar* response for those records only and waives none of the NSA's *Glomar* responses." He explained that "the case law demands precision when analyzing the scope of a *Glomar* waiver," and noted that "the message is clear: hold agencies to their official disclosures but be precise, lest courts force them to release sensitive information they have not actually disclosed." He cited the circumstances in *Wolf v. CIA*, 373 F. 3d 370 (D.C. Cir. 2007), as a good illustration of the precision required. There, Wolf had shown that 1948 congressional testimony of CIA Director Roscoe Hillenkoetter had acknowledged the existence of records on former Colombian politician Jorge Eliecer Gaitan. The D.C. Circuit agreed with Wolf that Hillenkoetter's testimony constituted an official acknowledgement of the existence of records pertaining to Gaitan but indicated that the CIA was only obligated to search for and process records about Gaitan disclosed by Hillenkoetter's testimony. Applying *Wolf* to the circumstances

here, McFadden pointed out that "the declassified memorandum encloses 'a list of recipients who may have received [Flynn's] identity in response to a request. . .to unmask an identity that had been generically referred to in an NSA foreign intelligence report.' The list consists of 'selected principals,' including Power. So the memorandum acknowledges that individuals made requests, on behalf of Power, to unmask Flynn. In doing so, it establishes the existence of records relating to these requests. . .And even more narrowly, the memorandum lists only six dates on which these requests were made."

The government contended that the list did not confirm that Power herself had requested the unmasking of Flynn. McFadden indicated that was irrelevant because whoever requested the unmasking was acting as Power's agent. He pointed out that "there is no suggestion here that in making the requests, the 'authorized individuals' were acting beyond the scope of their agency relationship with Power. So here, the requests from Power's subordinates were requests *from her*." Limiting the waiver further, McFadden observed that "the memorandum references only requests to unmask Lt. Gen. Michael Flynn, not anyone else. Given this silence, it does not establish the existence of unmasking records for any of the 46 others named in ACLJ's request." He pointed out that the waiver was also limited to the six dates identified in the Grenell-disclosed list.

ACLJ also pointed to testimony Power gave to the House Intelligence Committee in October 2017 as further basis for waiving her involvement in unmasking requests. But McFadden noted that "her testimony, standing alone, consists of statements by a *former* official, so it cannot overcome either agency's *Glomar* responses. . ." (*American Center for Law and Justice v. U.S. National Security Agency, et al.*, Civil Action No. 17-01425 (TNM), U.S. District Court for the District of Columbia, July 24)

Views from the States

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

Illinois

A court of appeals has ruled that while the Public Access Counselor, which is part of the Office of the Attorney General, faulted the adequacy of several searches conducted by the Department of Corrections for records concerning a water contamination problem at the Dixon Correctional Center in response to a FOIA request from inmate Vincent Boggan, because the Correctional Center's multiple searches ultimately located responsive records the PAC did not conclude that the Dixon Correctional Center improperly withheld records from Boggan. As a result, Boggan was not eligible for a mandatory penalty. Boggan complained to the PAC that the Dixon Correctional Center had not responded and that its final response that it had no responsive records was improper. The PAC found that the Correctional Center's search was inadequate but that no binding opinion was needed if the Correctional Center conducted an adequate search. Boggan filed suit against the Department of Corrections, arguing that he was entitled to mandatory penalties for the Correctional Center's failure to provide the responsive records in a timely fashion. The trial court dismissed Boggan's suit as moot. Boggan then filed an appeal to the court of appeals. The court of appeals also ruled against Boggan. The court of appeals noted that "since the [PAC] did not issue a binding opinion, section 11.6 of FOIA, which contains a rebuttable presumption that the public body willfully and intentionally failed to comply with FOIA, does not apply in this case." The court of appeals pointed out that "here, the [trial] court implicitly found respondent did not willfully and intentionally fail to comply with FOIA or act in bad faith when it denied

petitioner's request for additional relief in its August 2018 order." (*Vincent Boggan v. FOIA Office of the Department of Corrections*, No. 4-19-0347, Illinois Appellate Court, July 28)

Michigan

The supreme court has ruled that Thomas Ryan, who was serving as the city attorney for the City of the Village of Clarkston under contract, qualifies as a public officer for purposes of the Michigan Freedom of Information Act and that his communications with the City are public records under FOIA. While both the current Chief Justice Bridget McCormack, and the Chief Justice Pro Tem David Viviano argued that the issue involved was whether Ryan was acting as the agent of the city for delegation of authority purposes, the five other justices instead resolved the case by concluding that the office of city attorney for Clarkston had been created by the city charter and was thus a public office subject to FOIA. In response to a FOIA request from Susan Bisio for records concerning correspondence between Ryan and a consulting firm concerning a development project and vacant property within the city, Ryan told Bisio that the records were not public records because they had never been shared with the city. The trial court sided with Clarkston, finding that because the records were never shared with the city, they never became public records. Bisio then appealed to the court of appeals, which also ruled against her, but on the grounds that the definition of public record in the statute applied only to records prepared for or in the possession of a public body and did not apply to agents of public bodies. The supreme court disagreed, reversing the court of appeals decision. The supreme court pointed out that "under FOIA, a 'public record' is 'a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.' We reiterated that such 'public records' must be 'prepared, owned, used, in the possession or, or retained by a *public body*' and not by a private individual or entity. In the instant case, the office of the city attorney constitutes such a 'public body' because it is an 'other body that is created by state or local authority' pursuant to [the FOIA]." McCormack concurred separately, emphasizing the issue of agency. She observed that "there is no evidence that the Legislature intended to amend the common law of agency as it applies to FOIA; there is no reference in the FOIA's text to suggest that agency principles do not apply, let alone language that makes that clear. We presume that the Legislature is aware of the common-law rule that an agent stands in the shoes of the principal so that the acts of the agent (here, the city attorney) are attributed to the principal (here, the City)." Viviano dissented, arguing that the public body argument had only been presented to the supreme court at the last moment by the Michigan Press Association and should not have been considered. (*Susan Bisio v. City of the Village of Clarkston*, No. 158240, Michigan Supreme Court, July 24)

The Federal Courts…

A federal court in Pennsylvania has ruled that Daniel Manatt and Garen Meguerian have failed to show that the Department of Homeland Security has a **pattern or practice** of failing to respond to FOIA requests within the statutory time limit. In October 2018, Manatt and Meguerian submitted a FOIA request to U.S. Citizenship and Immigrations Services for records concerning the Zero Tolerance policy announced by the Department of Justice. The agency failed to respond and Manatt and Meguerian submitted a second FOIA request that did not duplicate their first request in September 2019. The agency rejected that request, claiming it was duplicative of their first request. After Manatt and Meguerian filed suit, USCIS told them that it had reviewed 9,182 pages of responsive records but did not release them or provide a *Vaughn* index. Manatt and Meguerian amended their complaint, alleging that the agency failed to disclose responsive records, failed to conduct an adequate search, and asked for injunctive relief for failure to implement a FOIA-compliant policy or practice. USCIS then provided a *Vaughn* index. It identified 9,80 responsive pages, disclosing 6,909 pages in full, withholding 164 pages in full and 694 pages in part, and referring 1,413 pages to DHS for evaluation.

In defense of its failure to respond within the statutory time limit, USCIS explained that it had 20 percent of al requests received by federal agencies, totaling 190,000 requests in 2019, and that it processes FOIA requests on a first-in, first-out basis. Judge Joshua Wolson found that explanation wanting. He pointed out that "USCIS's conduct violates FOIA. Congress made a choice to include in the statute an express 20-day requirement, with limited exceptions. No doubt, the proliferation of electronic records, growth of the federal government, and a more politicized environment make compliance with that requirement herculean. But the challenge of complying with FOIA is not an excuse for non-compliance. The law applies to federal agencies liked USCIS just like it does to everyone else." USCIS emphasized the volume of records it had reviewed in attempting to justify the **adequacy of its search**. Wolson, however, was not impressed. He noted that "but that information does not answer the question of whether the search was reasonable. The Court has no way to assess whether the documents that USCIS located are all, most, some, or only a small portion of the universe of responsive documents." To bolster its claim that USCIS had a policy or practice of failing to respond to FOIA requests in a timely fashion, Manatt and Meguerian pointed to a list of 74 other lawsuits claiming USCIS had failed to meet the statutory time limit. Wolson found this insufficient, noting that "ultimately, Plaintiffs' list of cases is just that – a list of cases. It provides the Court with no information about what USCIS did in each of those cases." However, he pointed out that "the Court suspects that USCIS does, in fact, have a pattern or practice of violating FOIA. . .The Court does not have the evidence before it to make that conclusion in this case." Manatt and Meguerian argued that some records were not protected by **Exemption 5 (deliberative process privilege)** because they were created after the announcement of the Zero Tolerance policy. But Wolson observed that "while adoption of a policy is a distinct event, agencies make granular decisions every day. Here, USCIS made routine decisions about how to respond to inquiries from Congress, the press, and the public. Decisions about how to respond to those day-to-day matters are agency decisions subject to the deliberative process privilege, even if they post-date the adoption of policy." Wolson also chastised DHS for failing to respond to an earlier court order to produce the records. He indicated that "DHS was not free to ignore this Court's Order. If DHS could not comply with the Court's Order, then its remedy was to show good cause and ask for more time. . DHS never filed such a motion. It just granted itself an extension." (*Daniel Manatt, et al. v. United States Department of Homeland Security, et al.*, Civil Action No. 19-01163-JDW, U.S. District Court for the Eastern District of Pennsylvania, July 20)

Judge Reggie Walton has ruled that records pertaining to discussions held by the Tax Reform Working Group that involved staff from OMB and the Department of Treasury as well as members of Congress are protected by the consultant corollary under **Exemption 5 (privileges)**. In August 2017, American Oversight filed a FOIA request with OMB and Treasury asking for communications between agency staff and members of Congress pertaining to potential tax legislation from January 2017 to the date a search was conducted. American Oversight filed suit in October 2017. The House Ways and Means Committee asked to intervene, arguing that some records were congressional records not subject to FOIA. American Oversight elected not to challenge that claim and ultimately 16 documents bearing legends asserting control by congressional committees were withheld because they were not **agency records**. However, both OMB and Treasury withheld records under Exemption 5. Addressing the Exemption 5 claims, Walton recognized that whether deliberations involving Congress qualified under the inter- or intra-agency threshold depended on whether the agency solicited the records from a non-agency party serving as a consultant to the agency and whether the records were created to aid the agencies' deliberative process. Walton found that the agencies had solicited the records in a consultant capacity. He noted that "the declarations show that Treasury consulted with the Tax Reform Working Group and other members of Congress and their staff to benefit Treasury's decisionmaking process regarding the development of tax reform legislation, and that Treasury relied on these communications like they would the analysis and recommendations of an outside consultant." American Oversight argued that Treasury had not specifically solicited some of the communications. But Walton

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pointed out that "this does not change the underlying fact that Treasury had established a consultant relationship with the Tax Reform Working Group and other congressional actors in aid of its deliberative process." He added that "this arrangement reflects a 'mutual understanding' between Treasury and Congress regarding not only the role that their communications would play in the process of agency deliberations, but also that those communications would be kept confidential. . ." American Oversight also argued that the congressional committees frequently consulted with Treasury rather than the agency consulting with Congress. But Walton observed that "the Circuit has recognized that 'back-and-forth communications between the agency and an outsider can fall within the consultant corollary [doctrine], even when the outsider has interests and goals that differ from those of the agency.'" Walton concluded that the congressional input aided Treasury's deliberations. He indicated that "the interests of the members of Congress who interacted with Treasury on the Trump tax reform initiative are 'sufficiently aligned with the federal agency's interests so as to be included in the consultant corollary [doctrine].'" While Walton admitted that the interests of some congressional members did not directly align with those of Treasury, any divergence could not be characterized as impermissible self-interest. Having found that the congressional input qualified under the corollary consultant doctrine, Walton found the agencies' deliberative process privilege claims appropriate. He noted that "the fact that congressional actors might also have benefitted from these communications does not negate the fact that the communications were also deliberative as to Treasury's decisionmaking process." (*American Oversight v. United States Department of the Treasury and Committee on Ways and Means of the United States House of Representatives*, Civil Action No. 17-2078 (RBW), U.S. District Court for the District of Columbia, July 22)

Judge Dabney Friedrich has ruled that the Department of Commerce has failed to justify its decision not to **search** some personal email accounts for communications pertaining to government business made or received by non-governmental email accounts established, controlled, or used by Commerce Secretary Wilbur Ross. Commerce located four non-governmental email accounts connected to Ross, two of which were personal accounts and two of which were "alias" accounts, in response to a FOIA request from the Democracy Forward Foundation. A search of Ross's email account using the four personal accounts yielded 56 pages. Because those emails showed that Ross had sent emails to other official email accounts of Commerce employees, the agency agreed to search the official email accounts of an additional 50 employees. That second search yielded an additional 280 email chains, comprising more than 600 pages of documents. After reviewing those email chains, DFF focused on 22 email chains where Ross or other agency employees did not forward emails sent to those personal accounts to official government email accounts. In response, Commerce argued that its searches were adequate because they were reasonably calculated to locate all of the emails requested by DFF, particularly those sent by Ross. However, Friedrich noted that "the declarants focus almost exclusively on those emails the Secretary *sent*. Missing from these declarations is any representation that the Secretary *routinely* copied or forwarded *all* Commerce-related emails that he sent or received through his personal email accounts, such that a search of his personal email account would be duplicative of the official email searches Commerce previously conducted." Friedrich observed that "it appears that many, if not all, of the emails in the exhibits attached to Democracy Forward's reply brief relate to official Commerce business. Commerce discounts a number of these emails as press inquiries and social invitations. But Commerce provides no authority for treating these types of documents differently under FOIA when they relate to the Secretary's official business. Commerce also acknowledged that the Secretary did not copy his official account when he sent four emails from his personal email account." Finding that Commerce had not shown that is searches were sufficient, Friedrich pointed out that "Commerce acknowledged that the Secretary used his primary personal email account for official busines without complying with federal recordkeeping requirements. Yet it limited its search only to official email accounts of the Secretary and other Commerce employees. Commerce's search was not 'reasonably calculated' to uncover all relevant documents."

(*Democracy Forward Foundation v. United States Department of Commerce*, Civil Action No. 18-0246 (DLF), U.S. District Court for the District of Columbia, July 22)

Judge Rudolph Contreras has resolved the remaining issues in a 13-year-old FOIA suit brought by Gregg Bloche and Jonathan Marks for records concerning the involvement of medical professionals in designing and implementing interrogation tactics during the Bush administration. In May, Contreras had wrapped up all the remaining issues except the Army's explanation as to its justification for its use of **Exemption 5 (privileges)** to withhold records under the deliberative process privilege and the attorney-client privilege. Although Contreras indicated in his earlier decision that the privilege claims might well be appropriate, he found that the Army's had not provided a sufficient justification. This time, however, Contreras found that the Army's supplemental explanation was acceptable. He noted that the remaining disputed documents consisted of an email exchange "between the attorney and the assistant with respect to health policy recommendations for modifying two entries on Army's comment matrix regarding a predecisional draft of Department of Defense Instruction." He pointed out that "Army clarifies that 'the assistant deputy for health policy sought legal advice from an Army attorney. . .and [the document] contains the Army attorney's legal advice and recommendations." Accepting the privilege claims with the added explanation, Contreras observed that "the added detail pertaining to [the disputed email exchange] satisfies the requirements for both the deliberative process privilege and the attorney-client privilege. . .Army has sufficiently updated its justification for the attorney-client privilege because it has demonstrated that the document involved a confidential communication regarding legal advice between the Army attorney and the assistant deputy." (*M. Gregg Bloche and Jonathan H. Marks v. Department of Defense, et al.*, Civil Action No. 07-2050 (RC), U.S. District Court for the District of Columbia, July 27)

A federal court in New York has ruled that the Department of Homeland Security properly withheld records requested by Delfino Garcia Gonzalez concerning his interactions with Homeland Security Investigations, a component of U.S. Immigration and Customs Enforcement, under **Exemption 7(E) (investigative methods and techniques)** and **Exemption 7(F) (harm to individual)**, even though Judge John Koelti's description of the withheld information as personally identifying data sounded much more like the protections typically afforded by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. An immigration judge in New York City granted Garcia Gonzalez's application for asylum. However, DHS appealed the decision to the Board of Immigration Appeals. Garcia Gonzalez made a FOIA request for his alien file. U.S. Citizenship and Immigration Services provided hundreds of pages in response to that request. Garcia Gonzalez made a separate request to ICE, which referred it to various components, including HSI. HSI initially located 10 responsive pages. A total of 81 pages responsive to Garcia Gonzalez's request were if disclosed, all of which were redacted in full. After Garcia Gonzalez indicated that dates in the redacted pages would help him in his immigration case, ICE re-reviewed the 81 pages and agreed to disclose those dates, withholding everything else. Garcia Gonzalez challenged the use of an *in camera ex parte* affidavit. Koetli, however, pointed out that "the subject matter of the plaintiff's FOIA requests concerns highly sensitive information collected for law enforcement purposes, and the use of *in camera* and *ex parte* affidavits is appropriate in order to avoid 'revealing precisely the information that the agency seeks to withhold.'" Garcia Gonzalez also faulted the **adequacy of the agency's search**, arguing that the agency failed to search all potentially responsive databases. Koetli disagreed, noting that "based on the Government's affirmation that the [FOIA staff] at HSI searched the databases and platforms that they believed, based on their subject matter expertise and the plaintiff's request, would most likely yield request documents, the Government has carried its burden of establishing that its search was adequate based on the databases and platforms it chose to use." Koetli agreed with the agency that it had shown the records Garcia Gonzalez

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requested were compiled for law enforcement purposes. He noted that "the plaintiff's own requests make clear that he, in order to establish his claim for asylum in removal proceedings, seeks documents and information concerning the plaintiff's interactions with ICE and HSI. Plainly, any documents responsive to that request would concern the law enforcement activities of ICE. . .and HSI." DHS told Koetli that redactions made under Exemption 7(E) "consist of law enforcement sensitive information and PII of ICE employees and other third parties." Koetli indicated that "the redacted portions of the handbook reveal law enforcement sensitive techniques, procedures, and guidelines that are not well known. Disclosure of this information could reasonably be expected to jeopardize ongoing ICE investigations and operations and assist those seeking to violate or circumvent the law." On Exemption 7(F), Koetli pointed out that "this exemption is appropriate in this case where disclosure of identifying information would put the life and physical safety of law enforcement agents and other third parties in danger." (*Delfino Garcia Gonzalez v. United States Citizenship and Immigration Services, et al.*, Civil Action No. 19-2911 (JGK), U.S. District Court for the Southern District of New York, July 29)

Judge Carl Nichols has ruled that pro se litigant Stephan Aguiar is not eligible for **attorney's fees** because his FOIA suit against the Executive Office of U.S. Attorneys did not cause the agency to disclose the requested records. Aguiar requested records on a drug-trafficking investigation of Aguiar in Vermont. After the agency failed to respond within the statutory time limits, Aguiar filed suit. While his litigation was pending, the agency asked him to narrow the scope of his requests. The agency ultimately withheld 124 pages and disclosed 13 pages in full and two pages in part. Aguiar then requested attorney's fees, arguing that his suit was the causal nexus for disclosure of the records. Although Nichols could have dismissed Aguiar's attorney's fees claim based on his pro se status, he instead went ahead and assessed whether his suit caused the agency to release the records. He pointed out that "while Aguiar is correct that the government did produce more documents and update the number of documents it declared it was withholding after he filed the lawsuit, he has not made clear how the lawsuit 'substantially caused' these acts. Most of Aguiar's assertions appear to point to the timing of events – namely, that he filed his suit and then the government released records. But pointing to that timeline, without more, is insufficient to establish the necessary causality to recover fees." (*Stephan Aguiar v. Executive Office of U.S. Attorneys*, Civil Action No. 18-02823 (CJN), U.S. District Court for the District of Columbia, July 27)

Judge Trevor McFadden has ruled that Democracy Forward Foundation failed to show that it had a cause of action under the **Federal Records Act** to require the Department of State to preserve the interpreter's notes of a conversation between President Donald Trump and Russian President Vladimir Putin that took place during a 2017 G20 Summit held in Hamburg, Germany. The meeting, which was the first time Trump had met Putin since becoming President, included the two men, as well as then-Secretary of State Rex Tillerson, the Russian foreign minister, and two interpreters. A year and a half later, the *Washington Post* reported that after the meeting Trump had asked State Department interpreter Yuri Shkeyrov to give him his interpreting notes, which he did. After the *Post* story broke, Democracy Forward Foundation and American Oversight sent letters to Secretary of State Mike Pompeo notifying him of a potential violation of the Federal Records Act and asking him to take action to recover Shkeyrov's notes. At the same time, Timothy Kootz, the Division Chief of the Records Archives Management Division and the Agency Records Officer at the State Department looked into the issue of whether interpreter's notes qualified as federal records. After consultation with the National Archives and Records Administration, Kootz concluded interpreters' notes were not federal records and did not pursue the matter further. However, Democracy Forward disagreed with that conclusion and filed suit under the Federal Records Act, claiming that the statute required Pompeo and the Archivist to initiate action to recover Shkeyrov's notes. Although the government moved to dismiss the case, McFadden found at the early stage that Democracy Forward had sufficiently pled a cause of action and refused to dismiss the case.

That caused the government to provide a more thorough explanation as to why it believed the records were not federal records. Addressing the Democracy Forward's FRA challenge, McFadden indicated that "both Democracy Forward's Section 706(1) and 706(2) claims, though, hinge on whether Shkeyrov's notes qualify as federal records. The State Department has already determined that they do not. And – even if it can review such a determination – the Court agrees." McFadden observed that "since the agency never designated the interpreter's notes as a federal record, the Secretary and the Archivist never had reason to believe that the President removed a federal record." Democracy Forward argued that the interpreter's notes qualified as a federal record because it had informational value. McFadden indicated that "NARA has determined that certain 'working files' such as preliminary drafts, rough notes, and similar documents – which undoubtedly contain *some* data with informational value – are still not appropriate for preservation. . .Here, the Government claims that Shkeyrov's notes are working files that do not meet the criteria for records under NARA's regulation." Democracy Forward also argued that the interpreter's notes had unique content that qualified them as federal records. But McFadden noted that "even assuming, though, that Shkeyrov's notes did contain some unique, substantive information, the Government confirmed that interpreters' notes in general – and these interpreters' notes specifically – are not and would not be 'circulated or made available to employees. . . for official purposes.'" Democracy Forward provided an affidavit from an interpreter who had worked at the State Department until 1997 which indicated that interpreters' notes were used to help write memos memorializing conversations. However, State provided an affidavit from Shkeyrov himself that contradicted the retired interpreter's recollection. Shkeyrov explained that his notes did not "make a record of what happened at the meeting" and he does "not believe it would be possible for someone else to accurately reconstruct what happened at the meeting or what was discussed from the jottings that he made in the course of interpreting.'" (*Democracy Forward Foundation, et al. v. Michael R. Pompeo*, Civil Action No. 19-01773 (TNM), U.S. District Court for the District of Columbia, July 23)

Judge Beryl Howell has ruled that subpoenas to telecommunications providers issued by Rep. Adam Schiff (D-CA) as part of the House Permanent Select Committee on Intelligence's impeachment inquiry are not subject to the common-law right of access because they are protected by **sovereign immunity** and are privileged under the Constitution's **Speech and Debate Clause** since they reflect on Schiff's legislative duties. After House Speaker Nancy Pelosi (D-CA) indicated on September 24, 2019 that the House would pursue its inquiry into whether President Donald Trump should be impeached, the Intelligence Committee authorized subpoenas for telecommunication providers on October 31, 2019. In December 2019, Judicial Watch submitted a request to the House Intelligence Committee for copies of all subpoenas sent to telecommunication providers. When the Intelligence Committee failed to respond, Judicial Watch filed suit, asking for a writ of mandamus requiring the Intelligence Committee to make the records available. In response to Judicial Watch's suit, the House argued that it was protected by both the doctrine of sovereign immunity, which prohibits suits against the federal government unless authorized by Congress, and the Speech and Debate Clause. Judicial Watch argued that the Larson-Dugan exception applied, which allows suits against the federal government when the alleged behavior is either unconstitutional or *ultra vires*. Howell indicated that whether Judicial Watch could overcome sovereign immunity hinged on whether it had a common-law right of access. Noting that not every action taken by Congress qualified as a public record, she pointed out that "here, the requested subpoenas were issued as part of HPSCI's investigative effort and such issuance, though undeniably a form of Committee action, was so preliminary to any final recommendation that this action lacks the legal significance to constitute a 'public record' to which the right of public access attaches. Consequently, plaintiff has no right to disclosure of these subpoenas under the common-law right of access." Judicial Watch also challenged the applicability of the Speech and Debate clause in this instance. Rejecting that claim, Howell noted that 'the Speech and Debate Clause bars this lawsuit because the subpoenas at issue were an 'integral part' of an impeachment inquiry, a 'matter which the Constitution places

with the jurisdiction of either House.' This case must therefore be dismissed." (*Judicial Watch, Inc. v. Adam B. Schiff*, Civil Action No. 19-3790 (BAH), U.S. District Court for the District of Columbia, July 27)

A federal court in Missouri has **fined** Jack Jordan, the attorney for Ferissa Talley, who herself has litigated as a surrogate for Jordan himself, $500 for continuing to submit email requests to the court's chambers even after being told to discontinue such behavior. Judge Ortrie Smith noted that "the Court has been tolerant of Plaintiff's counsel's abusive antics. Although ordered not to email Chambers staff and Clerk's Office employees, Plaintiff's counsel continues to disregard the Court's Orders. For his repeated violations of Court's Orders, including but not limited to the Court's Orders prohibiting Plaintiff's counsel from emailing Chambers staff and Clerk's office staff, the Court sanctions Plaintiff's counsel, Jack Jordan, in the amount of $500.00. . .For each future violation of the Clerk's Orders, the Court will sanction Plaintiff's counsel an additional $500.00 per violation." Smith added that "Plaintiff and her counsel are permitted to file a Notice of Appeal pertaining to the Order but shall not file anything further in this matter." (*Ferissa Talley v. U.S. Department of Labor*, Civil Action No. 19-00493-W-ODS, U.S. District Court for the Western District of Missouri, July 20)