Volume 46, Number 17
August 26, 2020

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

D.C. Circuit Rules District Court Erred in Ordering Deposition of Hillary Clinton 1

Views from the States 3

The Federal Courts 4

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.
Copyright by Access Reports, Inc
1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

No portion of this publication may be reproduced without permission.
ISSN 0364-7625.

Washington Focus: The U.S. Supreme Court announced its schedule for oral arguments in November. The Court's FOIA case this term – U.S. Fish and Wildlife Service v. Sierra Club, which deals with when an opinion becomes final under Exemption 5 – will be heard Nov. 2.

D.C. Circuit Rules District Court Erred in Ordering Deposition of Hillary Clinton

The D.C. Circuit has sharply criticized Judge Royce Lamberth for ordering former Secretary of State Hillary Clinton and Cheryl Mills, her former chief of staff at State, to be deposed by Judicial Watch as part of its FOIA litigation against the State Department challenging the adequacy of the search conducted by the agency while processing Judicial Watch's request for records concerning talking points used by then UN Ambassador Susan Rice in responding to press queries pertaining to the terrorist attack on the U.S. consulate in Benghazi, which killed then U.S. Ambassador to Libya Christopher Stevens. While finding that neither of them had to comply with the deposition order, the D.C. Circuit issued a writ of mandamus to Clinton, but not Mills. The D.C. Circuit noted that because Clinton had intervened in the appeal at the D.C. Circuit, she could no longer challenge a potential contempt citation if she disobeyed Lamberth's deposition order and that a writ of mandamus from the D.C. Circuit was therefore appropriate. But since Mills, as a non-party, could still challenge a contempt order from the district court, the D.C. Circuit found she had not shown entitlement to a writ of mandamus. In explaining the D.C. Circuit's reasons, Circuit Court Judge Robert Wilkins provided some comments on the limits to the use of discovery in FOIA cases.

Judicial Watch originally submitted its request for Rice's talking points in 2014. In March 2015, Judicial Watch learned that Clinton had used a private email server while Secretary of State. As a result, Judicial Watch asked for discovery. In a parallel case brought by Judicial Watch, Judge Emmet Sullivan granted discovery, which ultimately included interrogatories for Clinton and Mills' deposition. In January 2019, after that discovery was nearly completed, Lamberth ordered additional discovery and former State Department

ACCESS
REPORTS

employees, focusing on whether Clinton had acted in bad faith by using a private email server in an attempt to evade her FOIA obligations. In March 2020, after that round of discovery was substantially complete, Lamberth ordered Clinton and Mills to be deposed as well. Both Clinton and Mills then filed for a writ of mandamus from the D.C. Circuit.

Wilkins began by noting that the standard for obtaining a writ of mandamus against a lower court required a showing that (1) the petitioner had no other adequate means of obtaining relief, (2) the petitioner had shown a clear and indisputable right to a writ, and (3) the court in its exercise of discretion concluded the writ was appropriate under the circumstances. He then pointed out that "since the 'three threshold requirements are jurisdictional,' regardless of Ms. Mills' petition's merit on the other two inquiries, we are bound to deny her writ and dismiss her petition for lack of jurisdiction." He added that "since Ms. Mills could appeal either a civil or a criminal contempt adjudication, unlike Secretary Clinton she does have available an 'adequate means to attain the relief' and as such her petition fails at prong one."

Before moving to the second prong, Wilkins chided Lamberth for allowing the depositions in the first place because of "the burden the depositions would place on Petitioners given their scope and complete irrelevance to this FOIA proceeding." Considering the second prong, Wilkins pointed out that "although a district court has 'broad discretion to manage the scope of discovery' in FOIA cases, we find the District Court clearly abused its discretion by failing to meet its obligations under Rule 26 of the Federal Rules of Civil Procedure, by improperly engaging in a Federal Records Act-like inquiry in this FOIA case, and by ordering further discovery without addressing this Court's recent precedent potentially foreclosing any rationale for said discovery."

Lamberth had justified his expansion of discovery by suggesting that Clinton and the State Department acted in bad faith by trying to hastily bring the litigation to a resolution. But Wilkins indicated that "the mere suspicion of bad faith on the part of the government cannot be used as a dragnet to authorize voluminous discovery that is irrelevant to the remaining issues in a case. A district court's discretion to order discovery, although broad, is clearly 'cabined by Rule 26(b)(1)'s general requirements,' which allow parties to discover 'any nonprivileged matter that is relevant to a claim or defense and is proportional to the needs of the case.'" Wilkins noted that "here, the District Court ordered Secretary Clinton's deposition primarily to probe her motive for using a private email server and her understanding of the State Department's records-management obligations. However, neither of these topics is relevant to the only outstanding issue in this FOIA litigation -- whether the State Department conducted an adequate search for talking points provided to Ambassador Rice following the September 11, 2012 attack in Benghazi, or for any communications or records related to those specific talking points. The proposed inquiries are not, as Judicial Watch insists, 'vital to determining the adequacy of the search for records at issue in [its] FOIA request,' and we find there is little reason to believe that the information sought will be relevant to a claim or defense as required by Rule 26."

Wilkins continued, pointing out that "the District Court has impermissibly ballooned the scope of its inquiry into allegations of bad faith to encompass a continued probe of Secretary Clinton's state of mind surrounding actions taken years before the at-issue searches were conducted by the State Department. Secretary Clinton has already answered interrogatories from Judicial Watch on these very questions in the case before Judge Sullivan, explaining the sole reason she used the private account was for 'convenience.' But more importantly, even if a deposition of Secretary Clinton were to somehow shake some novel explanation loose after all these years, this new information simply would have no effect on the rights of the parties in this FOIA case, making it 'an inappropriate avenue for additional discovery.'"

Further, Wilkins noted that "discovery in FOIA cases is not a punishment, and the district court has no basis to order further inquiry into Secretary Clinton's state of mind, which could only conceivably result in

relief that Judicial Watch has already received – discovery." He pointed out that "furthermore, a bad-faith inquiry in a FOIA context is only relevant as it goes to the actions of the individuals who conducted the search. Since there is no evidence Secretary Clinton was involved in running the instant searches – conducted years after she left the State Department – and she has turned over all records in her possession, the proposed deposition topics are completely attenuated from any relevant issue in this case."

Wilkins then faulted Lamberth for misapplying the relevant legal standard for assessing FOIA searches. He observed that "an agency responding to a FOIA request is simply required to 'conduct a "search *reasonably calculated* to uncover all *relevant documents*."' Unlike the Federal Records Act – which requires federal agencies to protect against the removal or loss of records. . . – the appropriate inquiry under FOIA is much more limited." He pointed out that "here, rather than evaluating whether the State Department's search for documents related to Ambassador Rice's Benghazi talking points was adequate, the District Court has instead authorized an improper Federal Records Act-like inquiry to uncover purely hypothetical emails or communications." Further, Wilkins noted that Lamberth had ignored the implications of a recent D.C. Circuit decision involving the Federal Records Act, *Judicial Watch v. Pompeo*.744 F. App'x 3 (D.C. Cir. 2018). Here, Wilkins pointed out that "although *Pompeo* did not address this specific search for Ambassador Rice's Benghazi talking points, its language is clear – the State Department has exhausted every reasonable means to retrieve *all* of Secretary Clinton's recoverable emails." He noted that "we find the District Court did err by failing to address our findings in *Pompeo* and simply insisting Petitioners' depositions would somehow squeeze water out of the rock."

Finally, the D.C. Circuit concluded mandamus was appropriate under the circumstances. Wilkins observed that "in light of the importance of the congressional aims animating FOIA, and in order to forestall future, similar errors by district courts that would hamper the achievement of those aims, we find that the totality of the circumstances counsels us to hold, in the exercise of our discretion, that mandamus is appropriate under these circumstances." (*In Re: Hillary Rodham Clinton and Cheryl Mills*, No. 20-5056, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 14)

Views from the States

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

Nebraska

The Attorney General of Nebraska has agreed with data vendor Roger Hurlbert that the Dawes County Assessor improperly charged 50 cents a page for electronic records. Hurlbert submitted to a request to Dawes County for real property assessment records in electronic format. Assessor Lindy Coleman told Hurlbert there were 7,603 active parcels and that the records would cost $3,801.50 calculated at a rate of 50 cents per page. Instead, Hurlbert sent a check for $25, payable to Dawes County. Coleman returned Hurlbert's check and stated once again that the cost was $3,801.50. Hurlbert then appealed to the Office of the Attorney General, arguing that the public records act limited fees to the actual cost of reproducing the documents. The Attorney General agreed with Hurlbert, noting that the section on fees "expressly states that fees for copies of public records 'shall not exceed the actual cost of making the copies available.' With respect to electronic data, the fees are limited to 'the actual cost of the computer run time, any necessary analysis and programming by the public body, public entity, public official, or third-party information technology services company contracted

# #

ACCESS REPORTS

to provide computer services to the public body, public entity, or public official, and the production of the report in the form furnished to the requester.' Therefore, Ms. Coleman can only charge you what it actually costs to produce the records in the specific format that you requested." (Office of the Attorney General, State of Nebraska, Aug. 24)

North Carolina

A trial court has ruled that the North Carolina Railroad Company, a private corporation wholly owned by the State of North Carolina, is not a public body for purposes of the North Carolina Public Records Act. To learn more about the potential environmental impact of a Light Rail Project that would include a 17.7 mile light rail line linking Durham and Chapel Hill, the Southern Environmental Law Center submitted a request under the North Carolina Public Records Act to NCRR since it owned some of the existing tracks that the Light Rail Project would travel alongside in downtown Durham. NCRR refused to respond, contending that it was not subject to the North Carolina Public Records Act. Noting that this was an issue of first impression, the trial court looked for legislative indicia pertaining to the status of NCRR. The court concluded that "if it were the Legislature's intent that the NCRR be subject to the Public Records Act, it could have made that expressly clear [in legislation pertaining to the NCRR] or anywhere else within our General Statutes. It did not. . .At this time, the Legislature – despite numerous statutes dedicated to the NCRR and the Public Records Act – has chosen not to subject the NCRR to the Act, explicitly or implicitly." (*Southern Environmental Law Center v. North Carolina Railroad Company*. No. 19 CVS 500268, North Carolina Superior Court, Wake County, Aug. 20)

The Federal Courts…

Judge Carl Nichols has ruled that the Department of Commerce has failed to justify its invocation of **Exemption 5 (privileges)** in response to a request from CREW for records concerning communications between former White House advisor to the Commerce Department Eric Branstad and former Trump campaign official Rick Gates mentioning the defense firm Circinus, but that the agency appropriately withheld records under **Exemption 4 (confidential business information)**. The agency disclosed 165 pages of responsive records, withholding others under Exemption 4, Exemption 5, and Exemption 6 (invasion of privacy). CREW did not challenge the Exemption 6 redactions. The agency withheld two records under the deliberative process privilege. But CREW argued that the privilege was waived when the agency shared the records with Gates, who was a non-governmental third party. The agency claimed Gates did not review the email but just forwarded it as requested. Nichols found that irrelevant. He pointed out that "when analyzing waiver, the focus is not whether the recipient reviewed the disclosed information; instead, it is whether a disclosure occurred in the first place." Commerce also argued the email was protected by the attorney-client privilege because Gates was a necessary conduit to delivering the email. Again, Nichols disagreed, noting that "even assuming that Gates was a necessary third party, the government has failed to demonstrate that it attempted to protect the information after its disclosure. An agency must take steps to protect privileged material that is commensurate with the breadth of the privilege it seeks to claim." Turning to the Exemption 4 claim, Nichols noted that under the recent Supreme Court decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), information was protected under Exemption 4 if it was commercial and the business submitted the information to the agency with a reasonable expectation of confidentiality. CREW acknowledged that the records were commercial but argued that the agency had not provided an assurance of confidentiality. Nichols found the agency had sufficiently shown that it provided an implicit assurance of confidentiality. He pointed out that "the context in which Circinus provided Commerce information – to grow its business in foreign markets – supports the notion that it did so under an implied assurance of

confidentiality. Without such an assurance, companies liked Circinus would not seek Commerce's assistance because the information they provided could be revealed by simply submitting a FOIA request." However, Nichols agreed with CREW that since the name of the foreign government mentioned had been publicly disclosed, the agency was required to disclose that information. (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Commerce*, Civil Action No. 18-03022 (CJN), U.S. District Court for the District of Columbia, Aug. 14)

Judge Amy Berman Jackson has ruled that the Office of the Comptroller of the Currency properly withheld records under **Exemption 5 (privileges)** and **Exemption 8 (bank examination reports)** in response to a request from the James Madison Project and Kadhim Shubber, a reporter for the Financial Times, for records concerning the consent order including a civil penalty against Wells Fargo for opening up customer accounts without permission. OCC located 669 responsive pages but decided to withhold them entirely under Exemption 5 and Exemption 8. JMP and Shubber challenged only 34 pages, withheld under both exemptions. Berman Jackson initially indicated that "although FOIA exemptions must generally be 'narrowly construed,' it is well-established that the scope of Exemption 8 is 'particularly broad.'" Recognizing the breadth of Exemption 8, JMP and Shubber contended that the public domain exception applied since the American Banker, a trade publication, had described the agency's decisions. OCC told Berman Jackson that it had reviewed the American Banker article, highlighted the OCC public disclosures within the article, and concluded that the 34 pages were much more specific than anything revealed in the American Banker article. Relying on the agency's review, Berman Jackson noted that "the public disclosures identified by the plaintiffs are general statements regarding the outcome of the Horizontal Review that do not disclose bank-specific examination results or reveal the agency's deliberations and recommendations. Because the public disclosures are not as specific as the information the agency avers is contained in the pages at issue, the exception does not apply." Berman Jackson then rejected JMP and Shubber's **segregability** argument. Berman Jackson noted that "the agency declarant has averred that OCC conducted a detailed review of the responsive documents, and that none of the withheld pages could be reasonably segregated and disclosed and plaintiff has not presented any evidence to the contrary. Thus, the declarations submitted by defendant are sufficient to fulfill the agency's obligation to show with reasonable specificity that a document cannot be further segregated." (*James Madison Project, et al. v. Department of the Treasury*, Civil Action No. 19-2461 (ABJ), U.S. District Court for the District of Columbia, Aug. 13)

Judge Amy Berman Jackson has ruled that OMB properly withheld five documents under **Exemption 5 (privileges)** in response to a request from the Arab American Institute for records concerning whether Middle Eastern and North African would be included as a race reporting category on the 2020 Census. In response to the request, OMB located 291 responsive documents and disclosed 131 documents in full or part with redactions under the deliberative process privilege. OMB also withheld 161 documents in full under the deliberative process privilege. The Arab American Institute chose to challenge only five documents. Berman Jackson found that all five documents were both predecisional and deliberative. She noted that "because OMB has never publicly released a decision on whether to change the standards, the agency took the position that the 'decision-making process was never concluded, [and] all inter and intra-agency deliberations, regarding these matters during the time of the search qualify for the deliberative process privilege.'" However, the Arab American institute contended that the Census Bureau made a decision when it decided not to revise its race standards and that the decision not to decide constituted a final decision. However, Berman Jackson noted that "the fact that the Census Bureau did not include the category does not mean that OMB came to an end of its decision-making process on what *it* would recommend." She explained that "just because an agency has not made a decision does not strip records of their predecisional status." She indicated that

ACCESS REPORTS

"even if the agency had made an internal decision to maintain the status quo, the documents at issue would not lose their predecisional status because plaintiff has not shown that they have been 'adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.'" The Arab American Institute argued that statements made by Kathleen Battle, chief of the Census Bureau's Population Division, explaining the need for additional research and testing before the Census Bureau could proceed to implement separate Middle Eastern or North African categories was evidence of the decision to maintain the status quo. But Berman Jackson observed that "this statement was made by a Census Bureau official, not an OMB official. And, in any event, the statement demonstrates the ongoing nature of the inquiry – Ms. Battle states that the agency had not tested the category as an ethnicity separate from race, and that research still needed to be completed before the government makes its final decision." She pointed out that "the records are draft documents that lay out various recommendations and proposals, and disclosure of these documents 'would "discourage candid discussion within the agency."'" (*Arab American Institute v. Office of Management and Budget*, Civil Action No. 18-0871 (ABJ), U.S. District Court for the District of Columbia, Aug. 13)

The Second Circuit has ruled that FirstNet, an independent entity within the National Telecommunications and Information Administration, which is part of the Department of Commerce, is not an **agency** for purposes of the Freedom of Information Act. FirstNet was created in 2012 by Congress at the recommendation of the 9/11 Commission to oversee the development of the National Public Safety Broadband Network for first responders. Stephen Whitaker and David Gram submitted six FOIA requests to FirstNet, the Department of Commerce, and the NTIA for records concerning FirstNet's operations. A federal district court in Vermont ruled that FirstNet was exempt from FOIA, and that any records relating to FirstNet in the possession of NTIA were controlled by FirstNet. The district court had found that 47 U.S.C. § 1426(d)(2), a provision in FirstNet's enabling statute, exempted FirstNet from the Administrative Procedure Act (APA), which includes FOIA. Although Whitaker argued that FOIA was not commonly referred to as the APA, the Second Circuit agreed with the district court's ruling. The Second Circuit noted that "it is true, as plaintiffs argue, that the term 'APA' is commonly used to refer to the statute's provisions on rulemaking and judicial review of agency action, rather than to the subset of provisions enacted as part of FOIA." The Second Circuit indicated that "the statutory history of the APA supports our conclusion that FirstNet is exempt from FOIA. . . [A]lthough the term 'APA' is not commonly used to refer to FOIA, the Supreme Court has explained that 'the statute known as FOIA is actually a part of the Administrative Procedure Act.' The location of FOIA within the APA was deliberate." Whitaker also argued that § 1426(d)(2) did not qualify as an Exemption 3 statute because it did not refer to FOIA as required by the OPEN FOIA Act. The Second Circuit, however, observed that "Exemption 3 does not apply to agencies in their entirety but instead to certain types of records maintained by agencies – that is to 'matters that are. . .specifically exempted from disclosure by statute.'" Noting that the issue of whether an agency was required to conduct a search was a matter of first impression in the Second Circuit, the appeals court turned to cases from the D.C. Circuit concluding that whether a search for records would be treasonable under the circumstances was crucial. Applying the D.C. Circuit's reasonableness standard, the Second Circuit indicated that the agency's affidavits "adequately explain why

defendant would not have records responsive to those requests: the records sought concerned an independent entity's external communications, in which defendant was not required to be involved." (*Stephen Whitaker, David Gram, et al. v. Department of Commerce*, No. 18-2819, U.S. Court of Appeals for the Second Circuit, Aug. 14)

A federal court in Illinois has rejected pro se prison litigator William White's claims that various components of the Department of Justice are conspiring against him to prevent him from accessing the records he requested from multiple components. The court noted that "White ferociously argued his position to the Court in his summary judgment briefing, and the Court rejected the position as pure speculation. White may challenge that ruling on appeal, but White's disagreement with it is not an appropriate basis to alter or amend the judgment." The court found some merit in White's claims that the U.S. Marshals Service had failed to process his 2013 request. The court pointed out that "it turns out that, in reality, no responsive records had been processed or released at the time the Court entered judgment. The USMS has since begun processing White's request – more thoroughly than it ever had before – and is reporting regularly to the Court on its progress." The court indicated that it was "dismayed by the USMS's delinquency and must seriously consider White's request for a remedy." Ordering the government to address the issue at a videoconference hearing, the court observed that "the USMS shall have a knowledgeable representative at the hearing to answer any questions the Court may have about the processing of White's 2013 request. The USMS is warned that it would be well-served to have completed the release of responsive records to White before that hearing." (*William A. White v. Department of Justice, et al.*, Civil Action No. 16-948-JPG, U.S. District Court for the Southern District of Illinois, Aug. 25)

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334

Please enter our order for Access Reports Newsletter and/or Reference File, the two-volume, loose-leaf Reference Service. It will help us stay on top of developments in FOI and privacy. We may cancel for any reason and receive a refund for the unmailed issues.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $________________

Credit Card
Master Card / Visa / American Express
Card # _________-_________-_________-_________ Expiration Date (MM/YY):______/______
Card Holder:__________________________________ Phone # (______) _______-____________

Name:____ Phone#: (____) _____-______
Organization: _______________________________________ Fax#: (____) _____-______
Street Address:______________________________________ email: ______________________
City: ________________________ State:____________________ Zip Code: __________________

#