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

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Washington Focus: Nate Jones, who runs FOIA operations for the Washington Post, recently published a round-up of experiences of requesters because of the pandemic. While he found that federal agencies generally slowed down response times because of the pandemic, some states worked harder to get out pertinent information about the pandemic. Jones noted the Post sent a request to Kings County, WA in March for records about the pandemic, which responded within five days. Public records officer Julie Kipp observed that "we knew we were the first area that was hit with this and it is something that we either have to respond to now, or we will have to respond to later." She pointed out that "when people are scared. . .it behooves us to make sure that we are remaining open and people see how we are going about responding to this."

Court Finds Disclosure in Army Report Waives Agencies' Exemption Claims

U.S. District Court Judge Edgardo Ramos of the Southern District of New York has opened the slightly cracked door that was first breached by the D.C. Circuit's decision in *ACLU v.* CIA, 710 F.3d 422 (D.C. Cir. 2013) in which the D.C. Circuit found that it was no longer plausible for the CIA to claim that it had no interest in the use of drones in targeted killings, rejecting the CIA's *Glomar* defense neither confirming nor denying the existence of records and requiring instead that the agency process the request. Ramos' decision opened that door marginally further by rejecting the Defense Department's *Glomar* defense in responding to requests from the ACLU and the *New York Times* for records concerning the 2017 decision by the Trump administration to relax the restriction contained in a 2013 revision in the Obama administration's covert operations procedures because the revision had been disclosed by the U.S. Army's investigatory report of a 2017 incident in Niger in which four U.S. soldiers were killed in an ambush. However, while the template set out in *ACLU v. CIA* will probably continue to expand, requiring agencies to admit to the existence of records that are often commonly known by the media and researchers is something of a pyrrhic victory since those records probably remain subject to exemption claims.

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Ramos' ruling came in a case brought by the ACLU and the *New York Times* for records concerning the updated policies on covert operations. The 2013 revision by the Obama administration, known as a Presidential Policy Guidance, was dated May 22, 2013. A redacted version of the policy revision was released to the ACLU as part of 2016 FOIA litigation. Explaining the Obama PPG, Ramos indicated that it "prioritized capturing suspects and limiting lethal operations. . .It directed that these operations only be attempted when the United States has identified and located the target with near certainty, and when there is a near certainty that non-combatants will not be harmed." Further, the Obama guidance required that such operations go through a multi-step interagency review, including the National Security Council, before being approved by the President. In October 2017, the *New York Times* reported that Trump issued Principles, Standards and Procedures, relaxing the Obama guidance by making it simpler to approve such operations. As a result, the ACLU filed a FOIA request for the Trump PSP.

In June 2019, the Defense Department disclosed a redacted version of its investigation report of the October 2017 ambush in Niger, which killed four U.S. soldiers and four Nigerien partners. In discussing whether U.S. forces involved in the Niger operation followed White House policy, the report indicated that "On 3 October 2017, the Executive Policy governing direct action against terrorists on the continent of Africa was codified in the 'U.S. Policy Standards and Procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities.'" As a result of the investigation report, the ACLU asked DOD to confirm the existence of the updated guidance. Several months later, the *New York Times* also filed suit based on its October 2019 FOIA request for the updated guidance. Because of their similarity, the ACLU and *Times* litigation was consolidated and assigned to Ramos.

The government argued that its *Glomar* response remained tenable even after the disclosure of the existence of the updated guidance in the Army investigation report, while the ACLU and the *New York Times* contended that the Army report on the Niger ambush had waived the government's ability to sustain its *Glomar* defense. Ramos explained that "the Court finds the information at issue, when viewed on its own, was properly withheld under Exemption 1. But the Niger ambush report 'shifted the factual groundwork' on which the Court examines the propriety of the FOIA Exemptions. Although disclosure of the report does not qualify as an 'official disclosure' that would waive the agencies' ability to invoke Exemption 1, it does make the continued use of that exemption illogical and implausible."

The ACLU and the *New York Times* argued that the public affidavit submitted by Ellen Knight, then-Senior Director of Records Access and Information Security Management at the NSC, did not provide enough information to justify the government's *Glomar* response. Ramos indicated that "alone, this public declaration would be insufficient to show that the agencies' invocation of Exemption 1 was logical and plausible." But after reviewing the classified sections he noted that "the agencies have shown that potential harm to the national security could result if the existence of updates to the PPG are disclosed is logical and plausible." However, Ramos rejected the government's claim that the records were also protected under Exemption 3, citing the protection for sources and methods in the National Security Act. Ramos pointed out that "although the Court is aware of a 'broad sweep' of the Act in protecting intelligence sources and methods, it is the burden of the agencies to educate the Court on the connection between those concepts within the context of the case. . . [T]he Court credits the potential harm to national security of disclosure, but it does not see – through its review of the classified and unclassified Knight Declaration – the connection between that harm and the disclosure of intelligence sources and methods protected by the National Security Act."

In the Second Circuit, the official disclosure doctrine is based on the test articulated in *Wilson v. CIA*, 586 F.3d 171 (2nd Cir. 2009), finding that an official disclosure occurs only if the information deemed to have been officially disclosed is as specific as the information previously disclosed, matches the information previously disclosed, and was made public though an official documented disclosure. Applying the *Wilson* test here,

Ramos noted that "the record discussed in the Niger ambush report specifically discloses that the PSP supersedes previous guidance regarding the use of direct action by U.S. forces, and is therefore responsive to the ACLU's request. An interpretation that suggests otherwise would require purposeful distortion of the report's plain meaning. The information in the report is as specific as and matches the information the ACLU and the *Times* seek here."

Ramos found the disclosure ancillary to the purposes of the report. He noted that "the purpose of the disclosure in the Niger ambush report was to communicate the findings and recommendations coming from an investigation into the Niger ambush, *not* to discuss changes to the direct-action rules created by the Obama administration." He observed that "finding a Defense Department report by a major general and approved by the head of a U.S. combatant command is not 'official' approaches being a distinction without a difference." Her explained that "to allow an ancillary disclosure such as this one to force the Defense Department to waive an exemption could turn future FOIA suits into a game of 'gotcha,' allowing the decision of one subset of an organization to lead to the release of information potentially harmful to national security."

Because Ramos found that the disclosure in the Niger ambush report was not an official disclosure that waived the government's ability to Exemption 1, he indicated that an Exemption 1 claim now was untenable. He pointed out that "although the Court has found that the Defense Department did not intend to make an official disclosure regarding updates to the Obama Guidance, the reference to updated guidance regarding direct action against suspected terrorists is a necessary and explicit part of the report's findings and recommendations. Put simply, the Niger ambush report has credibly and conclusively established that the Obama Guidance has been superseded. No 'increment of doubt' remains." (*American Civil Liberties Union and the New York Times v. Department of Defense, et al.*, Civil Action No. 17-9972 (ER) and No. 20-43 (ER), U.S. District Court for the Southern District of New York, Oct. 5)

Views from the States

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

Pennsylvania

A court of appeals has ruled that the Office of Open Records erred in upholding the denial by the Department of Health of Michael Payne's request for records concerning the score given to BC12 when its permit for a medical marijuana grower-processor permit was denied, citing the predecisional deliberations exemption. Payne, an attorney for BC12, filed a complaint with the OOR, which upheld the agency's exemption claim. Payne then appealed to the court of appeals. The court of appeals reversed, noting that "it is not disputed that the Department itself released the score sheets and final scores of dozens of other successful and unsuccessful applicants whose applications were deemed complete. Thus, it is unclear how the Department can claim that such scores are confidential." The appellate court pointed out that "we cannot discern how the score or scores, either preliminary or final, as distinguished from the evaluation committee's notes or comments, disclose the [Medical Marijuana] Office's deliberations or deliberative process. Even if one could somehow successfully divine the deliberative process of the MM Office from the score sheet, the same would certainly be obvious from any of the dozens of other applicants' score sheets where *were* released. In sum, the scores are internal and predecisional, they are neither confidential nor deliberative." (*Matthew Scot Payne v. Pennsylvania Department of Health*, No. 579 C.D. 2019, Pennsylvania Commonwealth Court,

Sept. 15)

Wisconsin

A court of appeals has ruled that trial court used the wrong legal standard in determining whether Friends of Frame Park was eligible to recover attorney's fees for its litigation against the City of Waukesha for a copy of the contract the City had with Big Top Baseball to attract a minor league baseball team to play in Waukesha. Friends requested the draft contract, which was denied by the City under the confidential business information exemption. Friends then filed suit. Waukesha disclosed the entire draft contract two days later. Friends applied for attorney's fees, arguing that its litigation caused Waukesha to disclose the contract. The trial court instead, dismissed the case as moot. Friends appealed. The court of appeals found the trial court had used the wrong legal standard. The appellate court pointed out that "where litigation is pending and an authority releases a public record because a public records exception is no longer applicable, causation is not the appropriate inquiry for determining whether the requesting party 'substantially prevailed.' Rather, the key consideration is whether the authority properly invoked the exception in its initial decision to withhold release." Applying that standard here, the appeals court observed that "the City's reliance on the 'competitive or bargaining reasons' exception was unwarranted and led to an unreasonable delay in the record's release. Consequently, even if the lawsuit was not an actual cause of the release, Friends have 'prevailed in whole or in substantial part' and is entitled to some portion of its attorney's fees. . ." The appeals court noted that "Friends may recover fees only for those tasks relating to disclosure of the draft contract that was the subject of the October 9, 2017 records request." (*Friends of Frame Lake v. City of Waukesha*, No. 2019AP96, Wisconsin Court of Appeals, Sept. 16)

The Federal Courts…

A federal court in New York has ruled that the FDA properly withheld adverse event reports concerning the drug eteplirsen, used to treat Duchenne Muscular Dystrophy, a fatal neuromuscular disease that affects only 9,000 to 12,00 young males in the United States, under **Exemption 4 (confidential business information)**. Journalist Charles Seife filed a FOIA request with the FDA for records concerning the testing and approval process for eteplirsen, a drug created by Sarepta Therapeutics. The agency disclosed more than 45,000 pages, some of which were redacted under Exemption 4. Seife decided to contest exemption claims for certain documents in the agency's *Vaughn* index, particularly the adverse event reports. While the litigation was pending, the Supreme Court ruled in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 915 (2019), rejecting the competitive harm test from *National Parks*, replacing it with a customarily confidential standard for withholding confidential commercial information. Based on the changes in *Argus Media Leader*, Judge Jesse Furman pointed out that the only remaining issue was whether the redactions made by the FDA met the new commercial confidentiality standard articulated by the Supreme Court were proper. Furman found that the redacted information was both commercial and confidential under the *Argus Media Leader* standard, noting that "notably, since the time that Sarepta submitted the [disputed studies] to the FDA, none of the confidential data and final results associated with those studies has otherwise been publicly released and the information 'continues to be maintained in Sarepta's IT systems as confidential.'" Seife argued that the information was not confidential because the FDA had disclosed some of it when processing his FOIA requests. Furman rejected the argument, noting that "here, the FDA completed its production of information responsive to Seife's FOIA request on December 8, 2017. Thus, the Court need –indeed, may – look only to the information that was public as of that date to evaluate whether information was properly withheld by the FDA on the basis of Exemption 4." Furman also found that the **foreseeable harm** standard had been met as well. He observed that "the Court's task is to apply the law and the law is clear: There is no public policy or

public health exception that allows disclosure where, as here, Exemption 4 and the foreseeable harm test requirement (to the extent applicable) are met." (*Charles Seife v. Food and Drug Administration, et al.*, Civil Action No. 17-3960 (JMF), U.S. District Court for the Southern District of New York, Oct. 6)

After conducting an *in camera review* of the unredacted Mueller Report on Russian interference in the 2016 presidential election, Judge Reggie Walton has ruled that while the Department of Justice properly withheld records under **Exemption 3 (other statutes), Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**, the agency failed to justify its **Exemption 5 (privileges)** claims. Walton's ruling came in a consolidated case brought by BuzzFeed reporter Jason Leopold and EPIC for an unredacted copy of the Mueller Report. Since the report was initially redacted by DOJ at the time it was first released to the public, Walton decided it was necessary to view the report *in camera* to properly assess the application of the claimed exemptions. The agency withheld information under Exemption 3, citing Rule 6(e) on grand jury secrecy and the National Security Act. Walton found both had been properly applied. He rejected Leopold and EPIC's argument that some of the grand jury information had been made public. Instead, he pointed out that "although the identity of [Paul] Manafort as a grand jury witness may have been previously disclosed, 'citations to grand jury testimony would necessarily divulge the substance of the testimony,' and the disclosure of any additional information would reveal more than what is publicly available. Therefore, the Court finds that there has been no waiver of information by the government through official acknowledgment as to any of the individuals identified by the Leopold plaintiffs." Walton found that DOJ had appropriately redacted personally identifying information under Exemption 7(C). He noted that "the individuals identified by plaintiffs as public figures. . .nevertheless maintain an interest that is protectable under Exemption 7(C)." He added that "although an individual's 'interest in privacy *fades* when the information involved already appears on the public record,' 'the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the requested information." EPIC argued that some redactions under Exemption 7(E) did not qualify as techniques. Walton observed that "although the redacted information itself may not be 'a technique, procedure, or guideline,' with the disclosure of such information 'comes the knowledge of how the agency employs its procedures or techniques.'" Walton indicated that the names of individuals not charged with a crime were not protected by the deliberative process privilege. He pointed out that "mere identities of individuals not charged with having committed crimes in this context are neither predecisional nor deliberative." More broadly, Walton observed that "information withheld by the Department is not predecisional because, as plaintiffs correctly note, it is the decision of Special Counsel Mueller and such information is not protected by the deliberative process privilege." (*Electronic Privacy Information Center and Jason Leopold v. United States Department of Justice, et al.*, Civil Action No. 19-810 (RBW) and No. 19-957 (RBW), U.S. District Court for the District of Columbia, Sept. 30)

Judge Tanya Chutkan has ruled that the FBI has so far failed to justify its **Exemption 5 (privileges)** claims under the **foreseeable harm** test in response to a FOIA request from Judicial Watch for records concerning talking points prepared for managers to use in explaining then FBI Director James Comey's 2016 decision to close the agency's investigation on Hillary Clinton's use of a private email server. In response to Judicial Watch's request, the agency located two sets of talking points, one set prepared for Executive Assistant Directors and the other set for Supervisory Agents in Charge. The FBI withheld in full 70 pages of draft EADs and SACs talking points pursuant to Exemption 5, as well as Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records, and Exemption 7(E) (investigative methods or techniques). Judicial Watch challenged the agency's decision to withhold 47 pages under

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Exemption 5, arguing that the agency had not met the foreseeable harm standard. The FBI contended the records were protected under the deliberative process privilege because disclosure would result in either public confusion or chilling frank dialogue. Chutkan rejected both claims. She noted that "DOJ admits that many of the drafts contain edits, comments, and recommendations that track these changes. Indeed, as the revised *Vaughn* index descriptions indicate, all but five of the withheld pages at issue contain comments, edits, recommendations, or some combination of the three. Because these documents have at least some markings that indicate they are drafts, it is unlikely that they would be mistaken for final agency policy." She observed that "DOJ further contends that disclosing drafts that may contain factually inaccurate information would cause public confusion. However, DOJ admits that it has not fully vetted these drafts for factual accuracy. Until it has done so and can assert to this court that the documents do, in fact, contain inaccurate information, DOJ's assertions are merely speculative." On the matter of protecting frank dialogue, Chutkan noted that the agency's affidavit "falls short of meaningfully connecting the harm to the specific information withheld." However, Chutkan rejected Judicial Watch's contention that because the agency's affidavits were inadequate, she should order the records disclosed. She pointed out that "while DOJ's declarations and *Vaughn* indices are currently insufficient to justify withholding documents under Exemption 5, it should be given the opportunity to provide additional detail, taking into account the deficiencies identified in this opinion." (*Judicial Watch, Inc. v. United States Department of Justice*, Civil Action No. 19-800 (TSC), U.S. District Court for the District of Columbia, Sept. 29)

Judge Amit Mehta has ruled that U.S. Immigration and Customs Enforcement properly redacted a draft document under **Exemption 5 (privileges)** entitled "Criminal Street Gangs Investigations Handbook." The National Immigration Project of the National Lawyers Guild and other immigrants' right groups submitted a FOIA request for records concerning "Operation Mega" that related to immigration actions. One document produced in response to the request was a 12-page gang membership identification training course. The training course referenced two sources, one of which was the draft gang handbook, which was a 48-page document dated April 10, 2017, devoted to the investigations of criminal street gangs, reflecting techniques, procedures, and guidelines for conducting such investigations. ICE disclosed a redacted version of the draft handbook. Although the handbook was marked as a draft, the plaintiffs argued that the privilege had been waived because it now constituted the working law of the agency because of its reference in the training course materials. The plaintiffs argued that because ICE had indicated that the unredacted portions of the draft document represented agency policy such an admission further waived the privilege to the rest of document. But Mehta pointed out that "ICE *has* given such an explanation for why the unredacted portions of the Draft Handbook are 'unique': they are the only portions used in the 12-page training document. Mehta also rejected the plaintiffs' argument that ICE had the burden of showing that the draft had not been adopted as final policy. Mehta again rejected the claim, noting that "rather, to show that a document does not reflect the agency's working law, an agency need only present to the court 'the function and significance of the documents in the agency's decisionmaking process,' 'the nature of the decisionmaking authority vested in the office or person issuing the disputed documents,' and 'the positions in the chain of command of the parties to the documents.' ICE has met its burden here." Mehta also found the privilege claims met the **foreseeable harm** standard as well. He pointed out that "ICE has specifically explained that disclosure of the withheld information, which includes editorial judgments and significant changes between the draft and final versions, '*would* discourage the expression of candid opinions' and *would* result in a chilling effect on intra- and inter-agency communications.'" (*National Immigration Project of the National Lawyers Guild, et al. v. Immigration and Customs Enforcement*, Civil Action No. 17-02448 (APM), U.S. District Court for the District of Columbia, Sept. 29)

A federal court in California has ruled that the Farm Service Agency has so far failed to **conduct an adequate search** for records concerning its processing of FOIA requests and appeals from a coalition of environmental advocacy groups, including the Public Justice Foundation, the Anima Legal Defense Fund, the Center for Biological Diversity, the Center for Food Safety, and Food & Water Watch. The agency's first search yielded 29,830 pages of responsive records. The agency ultimately disclosed those records with partial redactions of 153 pages. Another search yielded 30,204 pages. The agency released 21,085 pages of those documents, withholding about 9,000 records under **Exemption 5 (privileges)**. However, the agency subsequently released those 9,000 pages apparently in an attempt to avoid litigating the privilege claims. In response, the coalition tried to provide FSA better guidance on what records they believed were responsive. Judge William Alsup found the current searches were not sufficient to locate records responsive to the groups' FOIA requests. He pointed that "there is no doubt that the agency's supplemental search uncovered troves of at least nominally relevant documents. But the relevant question is whether the *search* rated adequate, not the results." Alsup pointed out that "after spending more than a year clarifying plaintiffs' request, the agency's decision to ignore the clarifying information it sought and instead to perform the search based on a plain reading of the original request ranked as unreasonable." He indicated that the groups provided clarification of the request for FSA, although he agreed that the clarification was probably too vague. However, he observed that "the agency's renewed search, however, did not factor in any of the clarifying information it then had." He pointed out that "given that plaintiffs sought records pertaining to how the agency responds to plaintiffs' FOIA requests specifically, a reasonable search should have at least searched using plaintiffs' names. Instead, the agency unreasonably designed its search to capture only generally applicable policies." Alsup ordered the parties to work together to design and perform an adequate search. He noted that "plaintiffs are warned, however, that a search within these parameters will not be viewed as unreasonably narrow." (*Public Justice Foundation, et al. v. Farm Service Agency*, Civil Action No. 20-01103 WHA, U.S. District Court for the Northern District of California, Oct. 5)

Judge Ketanji Brown Jackson has ruled that the U.S. Agency for International Development properly withheld identifying information about grants or funding for Pakistan based media organizations under **Exemption 6 (invasion of privacy)** but that because of the Supreme Court's recent decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 915 (2019), abandoning the substantial harm test from *National Parks*, she cannot yet rule on the agency's **Exemption 4 (confidential business information)**. The FOIA request was submitted by Daniel Stotter. The agency eventually disclosed 1,705 pages some of them with redactions under Exemption 4 and Exemption 6. Stotter challenged the claims made under both exemptions. Brown Jackson indicated that "to begin with, the Court has little doubt that the withheld information in the grant records qualifies as 'similar files' for the purpose of Exemption 6, because the 'similar files' qualification pertains not only to entire records, but also 'bits of personal information, such as names and grant forms that Stotter seeks contain personal, identifying information about the grant recipients, and USAID represents that it has 'redacted from the grant clearance forms identifying information of contractor, grantee, and sub-grantee staff and beneficiaries, and related information that could be used to identify them, such as the name of a group with whom they were affiliated, or its location.'" She agreed with the agency that their privacy interests were clearly more than *de minimis*, explaining that "there is a recognized risk that the release of identifying information concerning individuals who are tied to the U.S. government and who work in a sensitive geopolitical region like Pakistan might subject those individuals to targeting, potential inquiries, or harassment." She indicated that it was unclear how disclosure of the identifying information would benefit the public interest, pointing out that "the unredacted information that USAID has released already details the agency's operations and activities that involve expanding access to, and improving, the quality of media in Pakistan." Stotter argued that the agency's privacy claims were merely speculative. But Brown Jackson pointed out that "because 'publicly identifying' USAID's grantees 'would subject those individuals' to

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potentially malicious inquiries or 'even harassment,' disclosure of their identities implicates a substantial privacy interest for the purpose of Exemption 6." Brown Jackson also agreed that the agency had conducted a sufficient **segregability analysis.** She explained that "the fact that the agency specified the sensitive fields that were redacted from the release, released the fields not subject to Exemption 6, and even reconsidered former redactions gives the Court confidence that USAID made a serious effort to release what it could, and excluded only that which was permissible under Exemption 6." Because of the intervening *Argus Media Leader* decision by the Supreme Court, Brown Jackson noted that "because neither Stotter nor USAID has addressed the new test for confidentiality, this Court is unable to resolve the parties' Exemption 4 disputed based on the record presently before it." (*Daniel Stotter v. United States Agency for International Development*, Civil Action No. 14-2156 (KBJ), U.S. District Court for the District of Columbia, Oct. 3)

A federal court in Washington has ruled that U.S. Customs and Border Protection did not **conduct an adequate search** in response to a FOIA request from the Council on American-Islamic Relations-Washington for records concerning the Seattle Field Office or Blaine Sector's enhanced vetting of individuals of Iranian heritage. The court also found the agency had failed to justify exemption claims made under **Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. The agency ultimately disclosed 147 pages with redactions. CAIR challenged the adequacy of the agency's search, arguing that the agency only searched the emails of three mid-level managers and failed to search the email account of Adele Fasano, who had been the SFO Director at the time. Although the agency agreed to search Fasano's email account, Judge Richard Martinez found the agency's search was so far insufficient. Martinez rejected the agency's deliberative process privilege claim, pointing out that "Defendants have failed to meet their burden to demonstrate Exemption 5 applies to these documents, which do not appear to have been prepared in order to assist in the making of a decision, and instead relate to the release of a public-facing statement describing events after a decision was made." As to Exemption 6, Martinez indicated that the agency had improperly "redacted the names of government officials in records not relating to those individuals. These are not personnel records or similar files." He observed that "CAIR has also demonstrated that the public interest lies in the release of the names of Assistant Directors and Port Directors playing a key role in the implementation of the policy at issue, which touches on the civil rights of U.S. Citizens and legal permanent residents." Martinez pointed out that the public interest in disclosure made Exemption 7(C) inapplicable as well. He ordered the agency to provide the directive implementing the policy for *in camera* review to assess whether it was protected under Exemption 7(E). Martinez noted that "release of the directive that mandated the detention of individuals based on national origin may be appropriate, along with the release of any communications discussing, implementing, criticizing or withdrawing that directive." (*Council on American-Islamic Relations-Washington v. United States Customs and Border Protection, et al.*, Civil Action No 20-217-RSM, U.S. District Court for the Western District of Washington, Oct. 5)

Judge Trevor McFadden has ruled that the U.S. Marshals Service has finally provided a sufficient explanation of its **search** for records concerning Angel Pichardo-Martinez, who had been assaulted while in custody when held at a facility in Youngstown, Ohio, and a second facility in Lake County, both of which housed USMS prisoners under contract. Pichardo-Martinez submitted two FOIA requests for medical records concerning the incidents. After Pichardo-Martinez filed suit, the agency indicated it had no record of receiving his requests but started processing the requests at that time. The agency searched offices in the Eastern District of Pennsylvania and the Northern District of Ohio, locating only a handful of records, some of which were disclosed with redactions. In his first opinion, McFadden found USMS had failed to adequately explain its search and told the agency it could submit supplemental affidavits. This time, the agency supplemented its affidavits, but Pichardo-Martinez did not file a response. McFadden agreed the agency had

now provided sufficient explanation for its searches. He noted that "based on the information Pichardo-Martinez provided, it is reasonable for USMS to have searched for responsive records in the two federal districts – the Eastern District of Pennsylvania and the Northern District of Ohio – where he had been detained, and in databases containing information about assaults and medical care provided for prisoners in USMS custody." McFadden then found that the agency had appropriately withheld personal information under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He agreed that USMS had met the low bar for claiming **Exemption 7(E) (investigative methods or techniques)**. He observed that "it is enough for the declarant to aver that release of the withheld information could enable unauthorized users to navigate databases and potentially 'counter operational and investigative actions taken by the USMS during enforcement operations.'" (*Angel Pichardo-Martinez v. U.S. Marshals Service*, Civil Action No. 18-02674 (TNM), U.S. District Court for the District of Columbia, Oct. 7)

Judge Timothy Kelly has ruled that the FBI and the Bureau of Alcohol, Tobacco and Firearms **conducted an adequate search** for records and that while the ATF properly withheld records under a number of exemptions in response to a request from Barbara Kowal, a paralegal at the Federal Defender for the Middle District Florida, which was representing convicted murderer Daniel Troya in his post-conviction hearings, the FBI has so far failed to justify its exemption claims. The FBI disclosed 134 pages in full and withheld 141 pages in full. It also referred 83 pages to the DEA. ATF located 467 responsive pages, releasing 61 pages in full and 212 pages in part, and withheld 194 pages entirely. Kowal challenged the adequacy of the searches conducted by both agencies, arguing that the FBI failed to search its ECF database as well as its CRS database. Kelly noted that "Troya, it should be noted, is not someone alleged to have a tenuous or passing connection to an FBI investigation; in fact, he was the subject of a federal criminal *prosecution*. Thus, a search of the CRS could reasonably be expected to produce the requested records pertaining to Troya, and the FBI's search constitutes a good-faith effort to locate the information requested by Kowal." Kowal also faulted the agency for using too few search terms. Kelly observed that "but the FBI need not use every search term and variation imaginable to Kowal; it need only conduct a search 'reasonably calculated to uncover all relevant documents.' The terms used by the FBI here meet that test. Kowal's wish for the FBI to have used more search terms does not make the search itself inadequate, and she has no right to dictate the FBI's scope of its search." Kowal contended that the ATF should have used the search term "Homer," an alias for Troya. However, Kelly pointed out that "the absence of 'Homer' as a search term does not undermine the reasonableness of the ATF's search, particularly when considering that the ATF was able to quickly locate its investigative file on Troya and retrieved the file with 'agents knowledgeable of the case.'" Kowal also complained that the ATF did not locate many relevant records that she had obtained from other sources. Kelly pointed out that "as for the absence of items allegedly in Kowal's possession, she has not explained why, just because *she* has them, the *ATF* must also have them such that it could produce them in response to a FOIA request." Kelly found the FBI's *Vaughn* index insufficient to justify its exemption claims but approved of ATF's **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. (*Barbara Kowal v. United States Department of Justice, et al.*, Civil Action No. 118-2798 (TJK), U.S. District Court for the District of Columbia, Sept. 24)

Judge Tanya Chutkan has ruled that the FBI **conducted an adequate search** for records concerning prisoner Michael Peak's request for records of evidence submissions from the Kentucky State Police crime lab pertaining to seven case and lab numbers. The FBI found no responsive records and suggested that Peak request the records from Kentucky under its open records act. Peak challenged the agency's search, contending the agency should have searched more locations. However, Chutkan pointed out that "an agency need not search every record system." She added that "speculation that records exist is not grounds to require a further search." She indicated that "an agency's FOIA obligations are triggered by its receipt of a request

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that 'is made in accordance with [the agency's] published rules.'" She pointed out that under Department of Justice FOIA regulations for submitting a FOIA request that "such procedures impose no duty on one DOJ component to search the files of another component for responsive records." (*Michael A. Peak v. United States Department of Justice, et al.*, Civil Action No. 18-3043 (TSC), U.S. District Court for the District of Columbia, Oct. 1)

A federal court in Maryland has ruled that U.S. Citizenship and Immigration Services properly withheld records under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)** in response to a FOIA request for the Catholic Legal Immigration Network for records concerning agency policies and guidance on Special Immigrant Juvenile Status. The Network argued that talking points about the program were not protected by the deliberative process privilege. The court disagreed, noting that "documents created in anticipation of press inquiries may be withheld under the deliberative process privilege so long as" they were drafted before the communications occurred and reflected drafters' opinions and analysis. The court observed that "the documents contain the nonfinal recommendations of junior staff to senior management about how policy decisions should be communicated to the public." The court also approved the agency's Exemption 7(E) claims, noting that "because release of the document would disclose how the Agency considers fraud indicators, creating a risk of circumvention of the law, the Court finds that the document was properly withheld under Exemption 7(E)." (*Catholic Legal Immigration Network, Inc. v. United States Citizenship and Immigration Services*, Civil Action No. 19-1511-TJS, District Court for the District of Columbia, Sept. 25)

Judge John Bates has ruled that the NAACP Legal Defense & Educational Fund has **standing** to pursue its claim under the **Federal Advisory Committee Act** against the Department of Justice for the establishment of the 2019 Presidential Commission on Law Enforcement and the Administration of Justice and that its challenge that the Commission's viewpoints are unfairly balanced is **justiciable**. The Commission was established by Executive Order in October 2019 to "study a broad range of issues regarding law enforcement and the criminal justice system" and to then make recommendations. Attorney General William Barr created the Commission in January 2020. Its membership consisted entirely of current and former law enforcement officials. LDF filed suit, alleging the Commission was in violation of FACA because it had failed to file a charter and its membership was not fairly balanced by viewpoint as required by FACA. Bates agreed with LDF, finding that the organization had standing. He observed that "LDF has suffered injury in fact for all of its claims" and noted that "because the designated federal officer requirement ensures that regulators and the public can obtain information about committees' operations, the Commission's failure to employ a designated federal officer has injured LDF." He then observed that "LDF has also suffered an injury because the government has denied LDF access to a representative voice on the Commission. LDF has an interest in and is directly impacted by the Commission's function of studying policing." In addressing the justiciability issue, Bates turned to the D.C. Circuit's decision in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F. 2d 419 (D.C. Cir. 1989). Bates indicated that "there, the Circuit deemed FACA's fair balance requirement – the same requirement that the government now argues is non-justiciable – justiciable. This is, admittedly, a difficult decision to parse, with each judge on the panel writing separate opinions. Nevertheless, it is clear that two of the three judges thought the fair balance requirement was justiciable." Bates observed that "in arguing that the requirement was not justiciable, the government relies almost exclusively on Judge Silberman's lone concurrence. . .But Judge Silberman's views did not carry the day." Bates found that the inappropriate influence requirement was also justiciable. He pointed out that "FACA's purpose was to ensure Executive Branch accountability in order to prevent wasteful expenditures resulting in biased proposals. It is thus highly unlikely that Congress intended to wholly preclude judicial review of the requirement to guard against inappropriate influence." The government also

argued that the Unfunded Mandates Reform Act, which provided an exception for committees where all members were federal employees, was applicable here. Rejecting the exception's applicability here, Bates indicated that "it simply cannot be true that all 'views' on the vast subject of law enforcement and the administration of justice 'relates to' the 'management or implementation of Federal programs established pursuant to public law that. . . share intergovernmental responsibilities simply because law enforcement is the subject of such programs. Nearly every broad area of policy is the subject of federal programs established by legislation over which federal, state, local, and tribal government have shared responsibilities." (*NAACP Legal Defense & Educational Fund, Inc. v. William Barr, et al.*, No. 20-1132 (JDB), U.S. District Court for the District of Columbia, Oct. 1)

A federal court in New York has ruled that the suit brought by the Natural Resources Defense Council under the **Federal Advisory Committee Act** is **moot** because the International Wildlife Council, which was established by the Department of the Interior to promote the economic benefits that result from U.S. citizens traveling to foreign countries to hunt, ended while NRDC's litigation was pending. Judge Alison Nathan pointed out that "courts agree that non-records claims like the ones here do not survive the termination of a FACA advisory committee." She also indicated that NRDC's records claims were now moot as well. She noted that "what would moot this case, however, is if the documents Plaintiffs seek have already been released. Once the documents in question have been disclosed, courts generally agree that a records claim under FACA is moot." NRDC argued that the agency had not shown that all records had been disclosed. But Nathan observed that "despite the extensive disclosures in this case, Plaintiffs fail to provide any evidence to support their contention that the agency continues to possess documents requiring disclosure. To be clear, Plaintiffs at this stage cannot rely on conjecture alone, and Plaintiffs must put forward evidence in the record to support their assertions and meet their burden of proof." (*Natural Resources Defense Council v. Ryan Zinke*, Civil Action No. 18-6903 (AJN), U.S. District Court for the Southern District of New York, Sept. 28)

After allowing a coalition of three open government advocacy groups – Citizens for Responsibility and Ethics in Washington, the National Security Archive, and the Society for Historians of American Foreign Relations – to amend their **Federal Records Act** complaint against the Department of State for failing to preserve historical records, Judge James Boasberg has again dismissed their suit for **failure to state a claim**, finding that the coalition's further allegations still do not provide sufficient evidence that the agency violated the FRA. The coalition alleged that the agency had taken affirmative steps to avoid creating permanent records documenting the agency's activities. In his first decision, Boasberg found that the coalition had only alleged isolated incidents of possible FRA violations and that many of their examples actually included non-agency individuals whose records were subject to the Presidential Records Act. Boasberg, however, explained that because "Plaintiffs' briefing included allegations of more recent FRA violations by State Department officials," he "invited Plaintiffs to take another stab at pleading." The new allegations still focused on non-agency actors like Gordon Sondland's instructions to staff at the U.S. Embassy in Ukraine not to take notes of their meeting concerning President Donald Trump's plan to coerce the Ukrainian government to announce its intention to investigate Hunter Biden. Boasberg was not impressed by the coalition's new allegations. He observed that "because Plaintiffs challenge the Department's 'deficient compliance with [the FRA] with regards to *some* of the records the agency creates,' rather than a 'policy, official or unofficial, setting agency-wide compliance with the FRA,' Count I once again cannot advance past the pleading stage." Count II alleged that the agency did not have a policy for preserving potentially ephemeral records. But Boasberg noted that the agency had adopted an FRA-compliant policy of preserving such records. He indicated that "while no doubt welcome news in a general sense to Plaintiffs, this revision to the Department's recordkeeping polices undermines the viability of their claim." (*Citizens for Responsibility and Ethics in Washington, et al. v.*

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Michael R. Pompeo, et al., Civil Action No. 19-3324 (JEB), U.S. District Court for the District of Columbia, Sept. 25)