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Washington Focus: The Interior Department, whose FOIA requests have risen sharply due in part to the controversy engendered by the Trump administration's environmental and land management policies, as well as its decision to revise its FOIA regulations in ways that open government advocates deem contrary to the statutory language, has created a new legal team to deal with its FOIA backlog. According to Nate Hegyi, who covers Utah for KUER's Mountain West News Bureau, Daniel Jorjani, who is currently the agency's Chief FOIA Officer, has brought in Rachel Spector to run the team, which will help with training, coordination, and the use of new technologies to increase the agency's efficiency in responding to FOIA requests.

Court Finds FOIA No Remedy For Grieving Families

The Freedom of Information Act is viewed by open government advocates as a vital tool for ensuring government accountability. The ability to request any agency records and to require agencies to provide such records subject to limited exemptions, FOIA allows requesters to explore the way in which agencies implement legislative and executive directives and the success with which agencies are performing their statutory functions. However, although vast areas of government information are potentially available under FOIA, it often falls short when asked to resolve wrenchingly emotional issues involving the fate of individuals whose disappearances are due either to government employment or government actions.

These cases often involve legitimately important national security concerns, or concerns over privacy, but to see instances in which the government refuses to admit what happened to covert operatives during the Cold War, or to inform individuals who were born to women abroad because of a relationship with a U.S. serviceman that to identify their fathers would invade the serviceman's privacy, are important emotional real-life matters that cannot readily be resolved through a FOIA request.

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Judge James Boasberg was faced with such a situation recently when he was asked to resolve a FOIA dispute between Obaid Ullah, the representative of the estate of Gul Rahman, an Afghan citizen who died in 2002 in an overseas detention center run by the CIA, and the agency. Boasberg observed that "almost two decades later, the whereabouts of his corpse remains unknown. Plaintiffs Obaid Ullah – the representative of Rahman's estate – and the American Civil Liberties Union now seek this Court's enforcement of their FOIA request for information about what happened after his death." Although the CIA has admitted that Rahman died while in its custody as the result of mistreatment, it has never officially informed Rahman's family of his death or returned his body to them. Trying to discover what happened to Rahman's body, Ullah and the ACLU submitted a FOIA request. The agency identified 38 responsive records and produced nine of the documents in part and withheld the remaining 29 in full. The CIA later determined that three of the documents withheld in full were not responsive. The agency justified withholding the documents under Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), and Exemption 7(D) (confidential sources). Boasberg explained that "the CIA acknowledges that the produced documents in their current redacted forms do not reveal the disposition or location of Rahman's body or any official policy the Agency has adopted with regard to the disposal of bodies. Frustrated in their pursuit of this specific information, Plaintiffs then informed Defendant of their intent to challenge the asserted withholdings." In response to Ullah and the ACLU's challenge to whether information could be segregated and disclosed, Boasberg decided to view the records *in camera*.

Boasberg began by indicating that "as an initial matter, the Court pauses to note the narrow range of the existing dispute between the parties. Plaintiffs do not contest the adequacy of the CIA's search itself or its withholdings under FOIA Exemptions 6, 7(C), and 7(D). While they ostensibly challenge the Agency's withholdings under Exemption 1, 3, *and* 5, the CIA has not justified any withholdings exclusively under Exemption 5. Instead, all documents and portions of documents for which the Agency has claimed Exemption 5 are also covered by Exemption 1 or 3 (and generally both)." As a result, Boasberg observed that "the Court therefore will consider only whether the CIA properly justified its claimed withholdings under Exemption 1 and 3, as well as whether it has satisfied its burden of demonstrating that no additional information is segregable and thus can be released."

Turning to Exemption 1, Boasberg explained that "generally, an agency invoking Exemption 1 must make both a procedural and substantive showing – namely, that it both 'complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification.' In this case, however, Plaintiffs challenge only the CIA's substantive showing. In particular, they principally question whether the release of the withheld information 'could be expected to cause exceptionally grave damage to national security.'"

Although Ullah and the ACLU criticized the CIA's affidavit defending its exemption claims, Boasberg noted that "in as much detail as [the agency] deems possible, [the agency affidavit] explains why disclosure of the information sought by Plaintiffs would harm national-security interests." He indicated that the activities the agency described in its affidavit "are 'highly sensitive' and their disclosure 'could impair the effectiveness of the CIA's intelligence collection.'" Ullah and the ACLU complained that innocent details such as the dates of Rahman's detention could not possibly be legitimately classified as national-security information. Boasberg disagreed, noting that "as a threshold matter, this Circuit's FOIA caselaw cautions strongly against second-guessing the Government's discretionary decisions in matters of national security. . .[C]ourts have consistently rejected attacks on the Government's invocation of Exemption 1 when faced with substantially similar affidavits and contested records as those at issue here."

Boasberg then explained that "this is not to suggest that Exemption 1 embodies an anti-disclosure talisman that the Government can wield whenever it so desires. Instead, the Court bases its conclusion on a

variety of specific factors beyond the sensitive nature of the records at issue: the explanation provided by [the agency's affidavit], the context supplied by the unredacted records, and the Court's own *in camera* review of the Government's withholdings. All told, the CIA's 'logical' assessment is not 'called into question by contradictory evidence in the record or by evidence of agency bad faith.'''

Boasberg accepted the CIA's assertion that even the date of Rahman's detention needed to be protected. He rejected Ullah and the ACLU's argument that because it was public knowledge that the CIA had operated in Afghanistan during 2002, such details should be disclosed. Instead, he pointed out that "plaintiffs' argument that the withheld information has already been disclosed that the CIA operated *generally* throughout Afghanistan in 2002 therefore misses the point entirely. Indeed, the year 2002 is not even redacted from the produced documents. Instead, *specific* dates and locations appear to be redacted – a conclusion confirmed by this Court's *in camera* review." Boasberg added that "this Court has previously embraced 'the intuitive proposition that official disclosure of information already in the public realm can nevertheless affect national security.' The 'mere fact' that some similar information about CIA operations may be in the public domain does not 'eliminate the possibility that further disclosure may cause harm.'"

Boasberg pointed out that disclosed portions of an Inspector General's report provided many grisly details about Rahman's treatment. He observed that "plaintiffs are therefore not in the dark regarding the circumstances surrounding Rahman's death, even as they understandably continue to seek more information on that subject." Recognizing how unsatisfactory that conclusion was for Rahman's family, Boasberg indicated that the plaintiffs "have access to the broad strokes of a grisly portrait of Rahman's death but seek the fine contours: more specific information as to the location of his remains and the process surrounding their disposal. Yet disclosing those details would officially acknowledge the specifics of an undisclosed CIA operation, the geographic position of a CIA facility, and the identities of any involved foreign partners. This Court simply cannot force the CIA to" disclose "its foreign partners, and its 'methods and resources.'" Boasberg also indicated that the Exemption 3 statutes cited by the CIA were equally applicable to the withheld records. (*Obaid Ullah, et al. v. Central Intelligence Agency*, Civil Action No. 18-2785 (JEB), U.S. District Court for the District of Columbia, Jan. 16)

Views from the States

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

Illinois

The supreme court has ruled that a settlement agreement between Wexford Health Sources, which contracts with the Illinois Department of Corrections to provide medical care for inmates, and the estate of an inmate who died from cancer is a public record subject to FOIA. Bruce Rushton, a reporter with the Illinois *Tines*, requested the records about the settlement of a lawsuit filed on behalf of inmate Alfonso Franco, who died of cancer in 2012. DOC told Rushton that it did not have the record but would obtain the settlement agreement from Wexford. Wexford refused to provide the record, arguing that it was confidential and that it was not directly related to the governmental function it performed for DOC. The trial court sided with Wexford, finding the settlement agreement was not directly related to the governmental functions it provided to DOC. However, the appeals court reversed, finding the settlement agreement was a public record and remanding the case back to the trial court to consider whether redactions should be made to the settlement

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agreement. Wexford appealed to the supreme court. The court agreed with the appeals court that the settlement agreement was a public record subject to FOIA. Wexford argued that a provision of FOIA referred to settlement agreements made by public bodies, and since Wexford was not a public body, its settlement agreement was not subject to FOIA. The supreme court noted that "it cannot be the case that the mere mention of the term 'public body' excludes parties who contract to perform governmental functions on behalf of a public body." The supreme court rejected Wexford's argument that the settlement agreement did not directly relate to its performance of a governmental function. Instead, the supreme court pointed out that "here, the governmental function that Wexford contracted to perform for the DOC – its normal government business – was the provision of medical care to inmates. The settlement agreement directly relates to the performance of that governmental function. It is the settlement of a claim that Wexford's inadequate medical care – its alleged *inadequate performance of its governmental function* – led to the death of an inmate. The connection is neither indirect nor tangential. It is direct and obvious." Finding that the settlement agreement was a public record, the supreme court sent the case back to the trial court, noting that "because the trial court concluded that the agreement was not subject to disclosure, it did not consider Wexford's alternative argument that certain information in the settlement agreement was exempt under various provisions of FOIA and should be redacted. We thus remand this case to the trial court for consideration of that issue." (*Bruce Rushton v. Department of Corrections, et al.*, No. 124552, Illinois Supreme Court, Dec. 19, 2019)

New York

A court of appeals has ruled that the New York City Police Department properly withheld records from Judicial Watch because the records pertained to an ongoing investigation. The court rejected an affidavit from a retired police detective trying to undermine the veracity and reliability of the affidavit submitted by a police captain asserting that the investigation was ongoing. The court also dismissed Judicial Watch's suggestion that the records could be disclosed with appropriate redactions. The court noted that "redactions to records sought under FOIL are available only under the personal privacy exemption." (*In re: Judicial Watch, Inc. v. City of New York, et al.*, No. 10583 and No. 190583A, New York Supreme Court, Appellate Division, First Department, Dec. 17, 2019)

Texas

A court of appeals has ruled that the Office of the Attorney General and the Department of Health and Human Services have not shown that Patricia Grant's requests for records on elder abuse should be dismissed for lack of jurisdiction. The agency argued that Grant had withdrawn her requests and that most of the responsive records contained exempt confidential information. But the court noted that "confidentiality is not jurisdictional. The agencies themselves characterize confidentiality as a 'defense' to the failure to disclose. Confidentiality is relevant to the merits of Grant's claims that the agencies have violated the Texas Public Information Act. . ." While the court agreed with the agency that Grant did not have standing to pursue her torts claims, the court pointed out that 'the same is not true of her claims under the Texas Public Information Act. Her claims that the agencies violated the Act by failing to make the information she requested available are claims that she, as the person requesting the information, is the injured party. Her claimed injury is lack of access to the information she seeks, and that injury is fairly traceable to the agencies' alleged violation of the Act." (*Patricia A. Grant v. Texas State Attorney General, et al.*, No. 14-18-00677, Texas Court of Appeals, Houston, Dec. 17, 2019)

Virginia

The supreme court has ruled that the George Mason University Foundation is not a public body subject to the Virginia Freedom of Information Act. Transparent GMU sent a FOIA request to the George Mason

University Foundation for records about donors. The Foundation declined to respond and told Transparent GMU that is was not a public body subject to FOIA. Transparent GMU filed suit. The trial court ruled in favor of the Foundation. Transparent GMU then appealed to the supreme court. The supreme court found that the Foundation was a separate entity from the University. The supreme court also noted that the Foundation was not supported by public funds. Transparent GMU argued that the Foundation operated as either an alter ego of the university or as an agent of the university. The supreme court observed that "while the Foundation and GMU acknowledge that they share a unique business relationship, their relationship is governed by formal contractual arrangements that reflect their independent status." The supreme court rejected the claim of agency as well. The supreme court pointed out that "the Foundation and GMU operate at arms-length and, while they collaborate for the benefit of GMU, each maintains its independent status as a private non-stock corporation and a public institution for higher education respectively." The supreme court concluded that "had the General Assembly intended the unreserved inclusion of non-profit foundations that exist for the primary purpose of supporting public institutions of higher education, as public bodies under VFOIA, it could have so provided, but it has not. Policy determinations of this nature are peculiarly within the province of the General Assembly, not the judiciary." (*Transparent GMU v. George Mason University*, No. 181375, Virginia Supreme Court, Dec. 19, 2019)

Washington

The supreme court has ruled that the while individual legislators constitute agencies under the Public Records Act, institutional legislative bodies do not qualify as agencies. Between January 25 and July 26, 2017, news media requesters made 163 PRA requests to the state senate, house of representatives, and the legislature as a whole, including requests to individual legislators. While counsel for the Senate and House responded to many of the requests, other requesters were told that legislative records were not subject to the PRA. As a result, a media coalition filed suit against the legislature arguing that all its records were subject to disclosure under the PRA. Ruling en banc, the supreme court found that individual legislators qualified as agencies and were thus subject to the PRA. The supreme court noted that "under the plain meaning of the PRA, individual legislators' offices are 'agencies' subject to PRA's general public records disclosure mandate. Legislative history confirms rather than contradicts our conclusion." But the supreme court found that the legislature had delegated the responsibility of responding to institutional requests to the Secretary and the Clerk. Here, the supreme court pointed out that "under the plain meaning of the PRA, institutional legislative bodies are not 'agencies' but are instead subject to the narrower records disclosure mandate by and through the Secretary and the Clerk. Legislative history bolsters that interpretation because the senate, the house, and the legislature have never been included in the definitional chain of 'agency' for purposes of the PRA." (*Associated Press, et al. v. Washington State Legislature, et al.*, No. 95441-1, Washington Supreme Court, Dec. 19, 2019)

The Federal Courts…

A federal court in Virginia has allowed the Southern Environmental Law Center's **pattern or practice** claim challenging the Interior Department's revised FOIA regulations to continue. In December 2017, SELC submitted a FOIA request to the National Park Service for records concerning the proposed crossing of the Blue Ridge Parkway or Appalachian National Scenic Trail by the Atlantic Coast Pipeline. The agency acknowledged receipt of the request seven weeks later, producing two responsive documents. It asked SELC to clarify its request in an attempt to narrow its scope. SELC did so. Seven months after submitting its request, SELC filed suit, alleging that three new memos issued by the agency – the Awareness Process

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Memorandum, a Deliberative Process Memorandum, and a Foreseeable Harm Memorandum – all issued in December 2017, had contributed to the agency's failure to respond to SELC's request. The agency argued that the court did not have jurisdiction to hear the case because SELC had **failed to state a claim for relief.** Judge Glen Conrad started by pointing out that both the D.C. Circuit and the Ninth Circuit had recognized pattern or practice claims. Citing *Hajro v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086 (9th Cir. 2016), Conrad noted that "the Ninth Circuit addressed the standing requirement applicable to a policy-or-practice claim under FOIA. The Court identified three requirements for establishing an injury in fact when a plaintiff alleges a pattern or practice of FOIA violations and seeks declaratory or injunctive relief: '(1) the agency's FOIA violation was not merely an isolated incident, (2) the plaintiff was personally harmed by the alleged policy, and (3) the plaintiff himself has a sufficient likelihood of future harm by the policy or practice." Conrad observed that "assuming that the Fourth Circuit would adopt the same test, the court concludes that SELC has satisfied each requirement at this stage of the proceedings." Noting that "SELC specifically alleges that the DOI Defendants have formally adopted the policies and practices as reflected in the Memoranda, that 'violate FOIA because they interfere with the agency's responsibility to "promptly" make records available upon request and are inconsistent with the obligation to disclose records unless disclosure would foreseeably harm an interest protected by a statutory exception,'" Conrad pointed out that "for purposes of standing, and without addressing the merits of the policy-or-practice claims, the court concludes that SELC has adequately alleged that the claimed FOIA violations were not isolated incidents." Conrad found harm to SELC as well. He explained that "SELC alleges that its FOIA request was subject to the policies and practices reflected in the Memoranda and that the policies and practices caused or contributed to the delays and withholdings of the records sought by SELC's request. SELC has therefore alleged concrete harm sufficient to establish an injury in fact at the pleading stage." Conrad found SELC had shown likely future harm as well. He pointed out that "in this case, SELC alleges that it regularly submits FOIA requests to DOI agencies, including NPS; that it intends to continue submitting such requests in the future; and that the DOI Defendants' policies will continue to harm SELC's interests unless they are enjoined by this court." Conrad next turned to causation. He explained that "to satisfy this requirement, a plaintiff must allege that its injury in fact is 'fairly traceable' to the defendants' challenged conduct." He noted that "the court is convinced that SELC's allegations, considered in combination, are sufficient to satisfy the causation requirement at the pleading stage." He also found SELC had shown that an injunction would redress its alleged injuries. He rejected the agency's contention that SELC was not eligible for an injunction. He noted that "whether SELC is actually entitled to injunctive relief is a matter that must be resolved on the merits." (*Southern Environmental Law Center v. David Bernhardt, et al.*, Civil Action No. 19-00011, U.S. District Court for the Western District of Virginia, Jan. 9)

A federal court in Illinois has ruled that U.S. Immigration and Customs Enforcement failed to **conduct an adequate search** for records requested by Jacqueline Stevens, a political science professor at Northwestern University specializing in immigration issues, and that the agency has not justified its claims made under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Stevens' request was for USC Claims Memos, prepared by ICE attorneys whenever ICE encounters an individual who makes a claim to U.S. citizenship or has certain indicia of U.S. citizenship. USC Claims Memos contain a factual examination and legal analysis of the individual's citizenship claim and suggest a recommended course of action as to whether to continue removal proceedings. Stevens requested all correspondence on detention or removal proceedings for people claiming or proving U.S. citizenship since January 2017. After the agency failed to respond within the statutory time limits, Stevens filed suit. The agency then collected 6,042 pages of responsive records. It disclosed 4,841 pages with partial redactions, released 280 pages in full, and withheld 746 pages entirely. The agency also withheld 158 pages as duplicates and referred 17 pages to other agencies. Stevens challenged the adequacy of the agency's search as well as its exemption claims. Stevens faulted the agency for searching only its Field Legal Office and

Immigration and Law Practice Division, a component of its Office of Principal Legal Advisor, claiming that Enforcement Removal Operations should have responsive records as well. The court noted that "an affidavit must, among other things, 'aver that all files likely to contain responsive documents were searched.' ICE's affidavit does not do so. Rather, it states that the ERO and LESC *do* have responsive documents – but that ICE did not search those divisions because it determined that the searches would not yield *unique* responsive documents. Later, in a reply, ICE clarified that 'ERO *searched* for responsive records and determined during that search that it did not possess any [unique] responsive documents.' This statement, however, stills falls short of an averment that ICE searched 'all files likely to contain responsive documents.' It also makes the court wonder why ICE did not simply produce the duplicates it purportedly located or explain why it would be burdensome to do so – especially because it appears that ICE did include duplicates in its production of documents maintained by the Office of Principal Legal Advisor." The court credited Stevens' claim that since the offices performed different functions, they could well have different records. The court noted that "but Stevens has articulated specific reasons why additional documents 'would have turned up if [ICE] had looked for' them. At this point neither Stevens nor the court have solid information about what ICE's records contain." The court indicated that its concerns would be alleviated if ICE disclosed the duplicates it had previously withheld. Stevens' primary criticism of the agency's exemption claims was that far more information had been withheld compared to earlier requests she had made for similar records. She pointed out that in response to her 2010 FOIA request, the agency withheld legal analysis and conclusions and recommendations contained in the USC Claims memos, but only lightly redacted the statement of the case and facts sections, and urged the court here to order the agency to disclose the same kind of information. ICE withheld all personal information in response to Stevens' current FOIA request, although it had disclosed contextual information in response to her 2010 FOIA request. The court agreed with Stevens, noting that "in response to Stevens' separate FOIA request in 2010, ICE appears to have released the very information it is now withholding. ICE attempts to justify its new approach by arguing that today, it is easier to find individuals' identities using contextual information." The court observed that 'to support its broad assertion that information available online today is so different than it was in 2010 that complete redaction of contextual information is required, ICE offers little. . . What this means is that ICE has not yet persuaded the court that releasing the contextual information Stevens seeks would jeopardize third-party privacy at all." The court also questioned the agency's claim that factual portions of the memos were protected by both the deliberative process privilege and the attorney work-product privilege. The court pointed out that "even assuming for the sake of argument that the work product and deliberative process privileges cover attorney recommendations and agency decision-making reflected in finalized USC Claims Memos, ICE has not adequately explained why it cannot segregate and produce statements that are purely factual." The court told ICE to provide supplemental affidavits if it wanted to continue to claim that disputed materials were privileged or protected by the privacy exemptions. (*Jacqueline Stevens v. U.S. Immigrations and Customs Enforcement*, Civil Action No. 17-2853, U.S. District Court for the Northern District of Illinois, Jan. 9)

Judge Trevor McFadden has ruled that intelligence agencies properly withheld information about its duty to warn journalist Jamil Khashoggi about Saudi plans to kill him if he entered the Saudi Arabian consulate in Istanbul under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. After Khashoggi's murder was revealed in the press, the State Department issue a press release indicating that "the United States had no advanced knowledge" of his disappearance. However, after a classified briefing, Senators indicated that they had no doubt that the Crown Prince of Saudi Arabia directed the killing. The State Department and the Treasury Department sanctioned 16 Saudi Arabian officials for their part in the killing. The Knight First Amendment Institute and the Committee to Protect Journalists sent requests to the CIA, the FBI, the National Security Agency, and the Director of National Intelligence for records concerning the governments' duty to warn Khashoggi about the attack. After the agencies failed to respond, the Knight Institute and the CPJ filed

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suit. The agencies then issued *Glomar* responses neither confirming nor denying the existence of records, citing Exemption 1 and Exemption 3. McFadden noted that "the central issue here is whether the State Department's press briefing a week after Khashoggi's as-yet-publicly-unconfirmed killing constituted an 'official' disclosure that overcomes the Intelligence Agencies' *Glomar* responses." McFadden indicated "recall that the CPJ voluntarily dismissed its claims against the State Department. This is significant because 'a disclosure made by someone other than the agency from which the information is being sought' is not 'official.'" He cited *Frugone v. CIA*, 169 F. 3d 772 (D.C. Cir. 1999), in which the D.C. Circuit rejected Frugone's claim that personnel-related information from OPM supported his claim that he had been a covert agent for the CIA in Chile. McFadden pointed out that "this holds whether the information reaches the public through Congress, a former official, the media, or a sister Executive Branch agency." CPJ argued that the State Department's admission carried more weigh here. But McFadden disagreed, noting that "but venerable as the State Department is, it is still a sister to the Intelligence Agencies here, no more able to speak about intelligence matters on behalf of 'the entire United States Government,' than OPM could speak for the CIA." He explained that "like *Frugone*, there is a substantial difference between the State Department's general press statement and confirmation (or denial) that the Intelligence Agencies had (or did not have) 'credible and specific information indicating an impending threat' to Khashoggi that would trigger the duty to warn. Indeed, the State spokesperson qualified his statement to protect those same intelligence interests." McFadden concluded by noting that "the assassination of Jamal Khashoggi was repugnant to humanity. The CPJ understandably seeks answers to explain the killing and protect other journalists from similar reprisals. But the Intelligence Agencies avow that the surest way to preserve the means and methods of intelligence collection against tomorrow's threats is to preserve them today. This is what the law compels and reason dictates." (*Knight First Amendment Institute at Columbia University, et. al. v. Central Intelligence Agency, et al.*, Civil Action N. 18-02709 (TNM), U.S. District Court for the District of Columbia, Jan. 6)

Judge Royce Lamberth has ruled that the Department of Justice and the CIA properly withheld records concerning the indictment and conviction of former CIA officer John Kiriakou on charges that he had disclosed classified information about covert CIA officers and their role in the CIA's Rendition, Detention, and Interrogation program under several exemptions, including **Exemption 1 (national security), Exemption 3 (other statutes),** and **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. In response to requests from the James Madison Project and reporter Ken Dilanian for records about the Kiriakou case, the agencies released 145 pages in full or in part. However, the CIA withheld its entire file, consisting of 205 pages, and the FBI withheld its entire investigative file, except for the publicly filed complaint, and DOJ withheld all of the grand jury proceedings. JMP and Dilanian challenged only the CIA's Exemption 1, Exemption 3, and Exemption 5 claims. JMP and Dilanian argued that the CIA's invocation of sources and methods was overbroad. Lamberth disagreed, noting that "the documents at issue concern the CIA's identification and investigation of unauthorized disclosures of classified information by a former CIA officer as well as the CIA's internal discussions and consultation with other agencies and agency components regarding the investigation and Mr. Kiriakou's ultimate arrest and prosecution. The intelligence activities, sources, and methods that the CIA withheld from these documents include counterintelligence investigation sources and techniques used to investigate the potential unauthorized disclosures, sensitive technical collection procedures used to conduct the investigation, and other information about CIA intelligence operations. Forcing the CIA to produce this information would mean forcing it to publicize details of certain CIA counterintelligence operations and other intelligence activities conduct abroad that are still classified." JMP and Dianian's challenge to the CIA's Exemption 3 claims yielded the same results. Here, Lamberth pointed out that "the information that the CIA has withheld consists of internal CIA and intra-agency communications regarding the Kiriakou investigation and prosecution as well as CIA records that would reveal sensitive technical means of conducting counterintelligence operations." JMP and Dilanian claimed that the communications from the CIA to DOJ

containing its recommendation pertaining to a possible criminal investigation or prosecution was the CIA's final decision and not protected by the deliberative process privilege. Again, Lamberth disagreed, noting instead that "DOJ is not bound by the recommendations of the CIA regarding prosecution, meaning that the CIA's recommendations in this context were not final decisions and were merely advisory." JMP and Dilanian also challenged the FBI's decision to categorically withhold its investigative file on Kiriakou under Exemption 6 and Exemption 7(C). While Lamberth acknowledged the public interest in Kiriakou's case, he noted that "the Court is in no way making a finding that the government did not commit any misconduct in its prosecution of Mr. Kiriakou; however, plaintiffs have not provided evidence of that misconduct sufficient to warrant release of the investigative file. Essentially, the government has established that disclosing the FBI investigative file could reasonably be expected to constitute an unwarranted invasion of personal privacy, and plaintiffs have failed to provide evidence that the public's interest in the information outweighs such privacy concerns." (*James Madison Project, et al. v. U.S. Department of Justice, et al.*, Civil Action No. 16-227-RCL, U.S. District Court for the District of Columbia, Jan. 150

The D.C. Circuit has ruled that the district court did not err when it found that the Grand Canyon Trust was not entitled to **attorney's fees** for its litigation against the Department of the Interior because there was not sufficient evidence that the organization's litigation caused the agency to provide the records. The Grand Canyon Trust submitted requests to Interior and the Bureau of Land Management. Within four months after the Trust filed suit, the agencies disclosed the lion share of the records requested. The Trust then asked for attorney's fees, arguing that its suit had forced the agencies to respond more quickly. The agencies contended that they responded in approximately the same time as they had predicted before the Trust filed suit. The district court agreed with the agency and the Trust appealed. In a per curiam opinion from a panel consisting of Chief Circuit Court Judge Merrick Garland, Circuit Court Judge Gregory Katsas, and Senior Circuit Court Judge A. Raymond Randolph, the D.C. Circuit reached the same conclusion. Before addressing the merits, the panel dealt with the issue of what **standard of review** should be used. The D.C. Circuit panel explained that the traditional catalyst theory – whether the litigation had caused the agency to disclose records – had been abandoned in light of the Supreme Court's ruling in *Buckhannon Board & Care Home v. West Virginia Dept of Health & Human Resources*, 532 U.S. 598 (2001), finding that attorney's fees were only available where the agency changed its position based on a court order. But Congress specifically reinstated the catalyst theory for purposes of FOIA as part of the OPEN Government Act in 2007. As a result, the D.C. Circuit panel indicated that the standard of review – whether the district court's decision was clearly erroneous – had been restored. The D.C. Circuit panel pointed that "that should come as no surprise. Appellate courts review findings of fact only for clear error, and actual causation is as much a question of fact in the FOIA context as it is any other." The Trust argued that the D.C. Circuit had used a *de novo* standard for some post-*Buckhannon* attorney's fees cases. But the D.C. Circuit panel observed that "where parties dispute a question of law – such as the meaning of a statutory term or of a judicial precedent like *Buckhannon* – we apply the de novo standard." The Trust argued that filing its lawsuit caused the agencies to accelerate their processing of the requests. However, the D.C. Circuit panel noted that BLM had finished its disclosure six weeks earlier than its prediction and that Interior had produced responsive records two weeks before its prediction. The D.C. Circuit panel pointed out that "these factors show that the agencies produced all of the requested documents roughly within the schedules that they had estimated before the litigation began. . .But predictions, by their very nature, are not perfect. The routine administrative and legal tasks required before agencies can release documents readily explain the minor timeline discrepancies here, particularly given the thousands of documents involved." Randolph, who in previous attorney's fees cases in which he participated has launched into a screed attacking the traditionally used four-factor test for determining entitlement to attorney's fees because it is not in the statutory language itself, concurred in the judgment but indicated that his main complaint was that the D.C. Circuit had blithely accepted that the attorney's fees amendment in the OPEN Government Act had

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restored the catalyst theory. Instead, he observed that "it does not do so because the provision requires only correlation not causation. Absence of statutory language supporting a theory (here the catalyst theory) is not evidence that Congress enacted the theory. Just the opposite." (*Grand Canyon Trust v. David Longley Bernhardt*, No. 18-5232, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 17)

The Ninth Circuit has remanded an Exemption 4 (confidential business information) case back to the district court in light of the Supreme Court's ruling last year in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in which the Court abandoned the substantial competitive harm test, replacing it with a customarily confidential test. In a case brought by the Animal Legal Defense Fund for records related to egg producers, the district court found that disclosure of four categories of information – total number of hen houses, number of floors per house, number of case rows per house, and number of case tiers per house – was unlikely to cause substantial competitive harm. The Ninth Circuit noted that "we agree with the parties that *Argus Leader* controls on appeal." The Ninth Circuit observed that "we find remand particularly appropriate here because the record is underdeveloped as to whether each egg producer customarily and actually kept each category of information at issue confidential." The Ninth Circuit added that "moreover, it appears that some (but not necessarily all) producers voluntarily publicly disclosed certain categories of information in ways that undermine confidentiality." (*Animal Legal Defense Fund v. United States Food and Drug Administration*, No. 19-15528, U.S. Court of Appeals for the Ninth Circuit, Jan. 16)

Judge James Boasberg has ruled that the Federal Energy Regulatory Commission must disclose some but not all personally identifying information about landowners who will be affected by the Atlantic Coast Pipeline, which will run across West Virginia, Virginia, and North Carolina. The Niskanen Center requested the lists of landowners supplied by the Atlantic Coast Pipeline under the provisions of the Natural Gas Act. Niskanen Center specifically identified four landowner lists. FERC provided eight lists – three of the four lists Niskanen Center had requested as well as five others. While FERC disclosed all identifying information on commercial or government entities, it redacted the names and addresses of individuals under **Exemption 6 (invasion of privacy)**. Niskanen Center filed an administrative appeal but subsequently filed suit. Hopeful that he could resolve the parties' disagreement, Boasberg held a status conference. Niskanen Center asked for the correct initials of each property owner and a street address, while FERC would only agree to disclose the initial of landowners and street names. Boasberg then considered the privacy interest in non-disclosure, noting that "although some individuals may be happy to reveal their home addresses, many are not. These landowners also have a privacy interest in not divulging that a natural-gas pipeline crosses their property – for example, to avoid potential protests on their land. Disclosing their names and addresses could result in an unwarranted surrender of their privacy." Assessing the public interest in disclosure, Boasberg observed that "here, Plaintiff seeks to shed light on whether FERC is enforcing its public-notice mandate. Put otherwise, it asserts that the public is interested in whether Defendant is ensuring that ACP is properly notifying affected landowners of the construction of a pipeline through their properties. To be sure, the Court concurs that such an interest is legitimate. The question at this point, however, is whether Niskanen needs *all* the information it seeks – *i.e.*, full names and full addresses – to evaluate FERC's conduct." Boasberg concluded that releasing the initials and street names but not the exact addresses was the appropriate balance. He pointed out that "the Court's role is not simply to facilitate Niskanen's disclosure interest. It is also tasked with giving due weight to the landowners' privacy interest, The proposed limited disclosure here is a just outcome, for it protects the privacy interest of thousands of affected landowners – by withholding additional personal information – without sacrificing the public's interest in disclosure." (*Niskanen Center v. Federal Energy Regulatory Commission*, Civil Action No. 19-125 (JEB), U.S. District Court for the District of Columbia, Jan. 15)

Judge James Boasberg has ruled that U.S. Immigration and Customs Enforcement **conducted an adequate search** for records concerning why the agency had searched Timothy Blixseth's private plane three times and properly withheld records under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods and techniques)**. In response to Blixseth's two requests, the agency located and provided 357 pages responsive to his second request. After an administrative appeal, the agency provided 48 pages responsive to the first request, withholding six pages entirely, and redacting 42 pages. After Blixseth filed suit, the agency provided more information from those 48 pages. Blixseth asked Boasberg to review the pages *in camera*, which he did. After reviewing the agency's affidavits, Boasberg indicated that "there is no genuine issue of material fact as to the adequacy of ICE's searches." Blixseth argued that since the searches of his planes had taken place, there must be more records. But the ICE explained that the searches had been conducted by the Marine Operations Center, which is part of U.S. Customs and Border Protection rather than ICE. As a consequence, Boasberg noted that "documents controlled by an agency other than the one processing the request do not constitute part of the defendant agency's FOIA obligation. As a result, Plaintiff's argument that ICE was required to search the records of different DHS agencies falls short." After reviewing the documents *in camera*, Boasberg agreed with the agency that the records, which were compiled by Homeland Security Investigations, qualified as law enforcement records." He noted "because all the documents constitute records of HIS's investigation into the safety of an expedited flight clearance for various aircraft, businesses, and persons, they are law-enforcement records" Boasberg found the withheld records contained personally identifying information and that Blixseth had provided no evidence of any public interest that might outweigh the privacy interest. As to the redactions made under Exemption 7(E), Boasberg noted that "the redacted material includes things like record identification numbers, databases used for investigation, code numbers (but not what they stand for), and questions and answers to certain inquiries undertaken as part of an HSI investigation. The Court therefore credits ICE's assertion that this information 'is not readily known by the public.'" (*Timothy Blixseth v. United States Immigration and Customs Enforcement*, Civil Action No. 19-1292 (JEB), U.S. District Court for the District of Columbia, Jan. 14)

Judge Timothy Kelly has ruled that the Bureau of Alcohol, Tobacco and Firearms **conducted an adequate search** and properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a request from prisoner Jermaine Bell for records concerning the 2001 murders of Torrence Johnson, Angelo Stringfellow, and Kenyatta Harris and the 1998 murder of Damien Barralle. BATF refused to process the request without third-party authorizations. Bell appealed that decision to the Office of Information Policy, arguing that the victims' names were in the public record as part of Bell's trial. OIP sent the request back to BATF for a search. BATF found no records. However, after Bell provide his case number, the agency found his file and a second unredacted file pertaining toTyree Stewart. Since the Stewart investigation was ongoing, BATF denied the records under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. After Bell filed suit, the Stewart investigation was closed. BATF then produced a single document with redactions under Exemption 7(C) relating to Kenyatta Harris's murder. Finding that BATF's supplemental searches were adequate, Kelly noted that "ATF manually searched the two investigation files which were previously found to contain responsive information – the Bell and the Stewart file – to determine whether they contained any additional responsive information. In light of ATF's supplemental searches, which did yield additional responsive documents, and its description of the types of searches performed and the search terms used, the Court agrees that ATF has 'conducted a search of records systems reasonably likely to contain responsive information using search methods that were reasonably designed to locate such information.'" Kelly indicated that the agency's exemption claims were appropriate. He pointed out that "here, ATF represents that the information redacted is, in summary, identifying information (including names, birthdays, addresses, and phone numbers) of suspects, criminal associates,

witnesses, Baltimore Police Department directives and ATF agents. Release of this information could subject these individuals to danger or harassment, and there is little countervailing public interest." (*Jermaine Bell v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Civil Action No. 17-1221 (TJK), U.S. District Court for the District of Columbia, Jan. 3)

A federal court in California has ruled that pro se litigant Dennis Buckovetz may amend his FOIA complaint to challenge the **adequacy of the search** by the Department of the Navy since it failed to find emails the agency claimed had been deleted and to ask for **attorney's fees and sanctions**. The Navy argued that it would be futile to allow Buckovetz to amend his complaint at this stage since the agency had shown that the emails no longer existed. The magistrate judge found that Buckovetz's amendment reqeuest was not futile, pointing out that "plaintiff may recover emails if the Court finds Defendant's initial search was inadequate. Therefore, his amendment regarding deleted emails in not necessarily futile." The agency argued that adding counts for attorney's fees and sanctions was also futile since Buckovetz was not represented by an attorney. But the magistrate judge explained that "amendment is not futile if Plaintiff were to retain counsel. The Court advises Plaintiff that in order to receive attorney's fees he must actually hire an attorney to represent him in the action and not merely counsel him." Since a finding of sanctions is tied to an award of attorney's fees, the agency claimed amending the complaint to include a sanction count was also futile. However, the magistrate judge noted that "amendment, therefore, is not necessarily futile because the Court may ultimately 'order the production of any agency records' in connection with the dispute and 'assess against the United States reasonable attorney fees and other litigation costs.'" (*Dennis M. Buckovetz v. United States Department of the Navy*, Civil Action No. 18-2736-MDD-KSC, U.S. District Court for the Southern District of California, Jan. 7)

A federal court in Michigan has ruled that the Michigan Immigrant Rights Center and other immigrant rights groups have not shown that they are entitled to an **interim fee award** in their three-year litigation against the Department of Homeland Security. The groups submitted a FOIA request for four categories of records. Although the agency began to provide records from the first category, the groups ultimately filed suit. After litigation was filed, the parties spent most of the next several years discussing production schedules and reviewing records. In April 2019, the groups filed a motion seeking an interim award of attorney's fees. The court acknowledged that an interim award was appropriate under certain circumstances but found the groups had not shown that they were entitled to one under these circumstances. The court pointed out that "this case is near its conclusion, as the Court has ordered Defendants to make a final production no later than February 14, 2020. Because the goal line is in sight, there is less urgency for an interim decision. . ." The court observed that "in determining whether a plaintiff is entitled to an award of attorney fees and costs in a FOIA action, 'district courts are directed to take into consideration the *overall* degree of a plaintiff's success. . .' At the present stage of the litigation, a determination of Plaintiffs' overall success would be premature. Deferring this evaluation would permit the Court to consider more comprehensively – against the backdrop of the entire litigation – the significance of the ultimate relief obtained by Plaintiffs." (*Michigan Immigrant Rights Center, et al. v. Department of Homeland Security*, Civil Action No. 16-14192, U.S. District Court for the Southern District of Michigan, Jan. 8)

In a case that seems endless, a federal court in Missouri has refused to reconsider its prior ruling in a FOIA suit brought by Ferissa Talley against the Department of Labor for emails sent by two attorneys at DynaCorp which became part of a proceeding before an administrative law judge. The original action was brought in U.S. District Court for the District of Columbia by Jack Jordan, who was presenting his wife in the underlying action. Judge Rudolph Contreras agreed with the Labor Department that one of the emails was privileged under Exemption 4 (confidential business information). Contreras's decision was upheld by the

D.C. Circuit. Apparently undaunted, Jordan the filed the same case in U.S. District Court for the Western District of Missouri, which also ruled against him. Jordan's appeal in that case is pending at the Eighth Circuit. In the current litigation, Jordan represents Talley, who made a FOIA request for the same records, in the same district. The court ruled against Talley as well. Talley then asked the court to reconsider its decision and asked that the judge be disqualified. In response to that request, the court indicated that "like Jordan, Talley lodges unsubstantiated and meritless accusations against the undersigned. However, such conclusory and unfounded allegations are insufficient to support disqualification." (*Ferissa Talley v. U.S. Department of Labor*, Civil Action No. 19-0043-W-ODS, U.S. District Court for the Western District of Missouri, Jan. 8)

Judge Randolph Moss has ruled that Robert Fleck, Chief Counsel of the Procurement Law Group in the Office of the General Counsel at the Department of Veterans Affairs has sufficiently pleaded a cause of action for his suit claiming a violation of the **Privacy Act** through the disclosure of an allegedly inaccurate OIG report accusing Fleck of having improperly influenced the agency's hiring of his wife, Kristina Wiercinski, as an e-discovery attorney for the OGC's Real Property Law Group. In 2016, multiple senior attorneys within the OGC's acquisition groups decided to hire an e-discovery attorney. During a conference call to discuss the position, Procurement Law Group Deputy Counsel Vincent Buonocore recommended Wiercinski for the job based on his experience supervising her when they both previously worked as attorneys for the Army. Fleck participated in the conference call but did not recommend or promote his wife in any way. Richard Hipolit, Fleck's superior, later asked Fleck to pass along his wife's resume. He did so, but recused himself from any further discussions regarding hiring an e-discovery attorney once he learned that Wiercinski was a candidate. After a Best Qualified panel of three Real Property Law Group employees was convened to select a candidate, Wiercinski was hired. Before she was officially hired, Fleck forwarded an email to his wife listing the VA's discovery issues. Wiercinski started her new job in January 2017. In mid-2017, the OIG initiated an investigation into Fleck's conduct during the hiring process and Wiercinski's selection for the e-discovery attorney. The OIG report faulted Fleck's role in the hiring process and recommended discipline against him and Wiercinski. Although the VA's General Counsel did not find that Fleck had committed conduct unbecoming, he found Fleck had inappropriately shared sensitive information with Wiercinski. The incident got some media attention. Fleck filed a suit under the Privacy Act, claiming the agency violated subsection (e)(5), by failing to maintain accurate, fair, and complete records. He alleged that his job application for a position with another agency was primarily rejected because of the OIG's report. The VA argued that Fleck had not suffered an adverse action. But Moss pointed out "defendant has not argued that the other agency's failure to hire Plaintiff cannot serve as a qualifying adverse agency action because it was taken by an agency distinct from Defendant. . ." The agency also argued that Fleck had not shown that the OIG report was inaccurate. Pointing to the low threshold for stating a claim under the Privacy Act, Moss noted that "Plaintiff plausibly alleges that the report's conclusion that he advocated for Wiercinski as a candidate and was involved in the selection process, shared confidential information with her prior to her selection for the job, and lied when interviewed by investigators were inaccurate." Moss found that Fleck had shown causation in linking the other agency's failure to hire him with the publication of the report. He added that "Plaintiff's allegation that he was denied a position that would have paid him more than his present job, although lacking in detail, suffices at the pleading stage; he has plausibly alleged both a necessary element of his claim and that he has standing." (*Robert Fleck v. Department of Veterans Affairs, Office of the Inspector General*, Civil Action No. 18-1452 (RDM), U.S. District Court for the District of Columbia, Jan. 3)

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