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Washington Focus: In a videoconference held Oct. 16 as part of continuing FOIA litigation by BuzzFeed and EPIC to force the Justice Department to disclose an unredacted copy of the Mueller Report, Judge Reggie Walton sharply criticized the government for ignoring the clear meaning of an Oct 6 tweet by President Donald Trump authorizing the declassification of all records related to the investigation of Russian interference into the 2016 presidential election. Walton told DOJ's attorney that "it seems to me when a president makes a clear, unambiguous statement of what his intention is, that I can't rely on the White House Counsel's Office saying 'Well, that was not his intent.'" He added that "I think that I need something more emphatic than this, in fact, the president's position, and not just the White House counsel's position."

Court Questions ICE's Undue Burden and Records Creation Claims

A federal court in New York has questioned whether U.S. Immigration and Customs Enforcement conducted an adequate search for data in response to requests from the Transactional Records Access Clearinghouse for anonymized records concerning detainees and the disposition of their cases. Although ICE had disclosed such data in the past, starting in 2017 the agency began to claim that its databases did not include all the data points TRAC requested and instead insisted that to provide the data requested would require the agency to write new software programs to retrieve such data outside the normal functions of the database, thus requiring it to create a record. Further, ICE contended that to comply with TRAC's requests would be unduly burdensome. However, Judge Brenda K. Sannes concluded that even if she accepted ICE's claim that it would need to write and run a new software program to retrieve the data, the agency had not shown that data elements that were part of TRAC's requests could not be retrieved from a separate database.

One of the FOIA requests in dispute asked for 150 total data points, while the second asked for 131 total data points. In response to the requests, ICE produced 74 data points for the first request and 45 data points for the second request. In moving for summary judgment, ICE stated that

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it did not produce certain data requested (1) "because the request in effect asked a question or constituted an implied question," (2) the data points were not reasonably described or did not exist in the form requested without additional analyses or calculations, and (3) the data points simply did "not exist in the database as written." Sannes rejected ICE's motion for summary judgment but allowed the agency to supplement its affidavits and submit a renewed motion. ICE's renewed motion for summary judgment indicated that additional data either did not exist, that responding to TRAC's requests would require creation of records, and that providing more data would be unduly burdensome. TRAC asked for an evidentiary hearing, which Sannes granted.

The evidentiary hearing was held on August 15, 2019. Curtis Hemphill, a detention and deportation officer in ICE's Enforcement and Removal Operations Statistical Tracking Unit, testified for the agency, as did Patricia de Castro, who had responded to TRAC's original requests and worked at an operations research analyst in ICE's Enforcement and Removal Operations. Susan Long, the co-director of TRAC, testified for TRAC, but Sannes rejected TRAC's request to allow Dr. Paul Clark's expert testimony, although Sannes indicated she would take Clark's declaration into consideration.

ICE explained that it had two relevant databases – the Enforcement Integrated Database (EID) and the ICE Integrated Decision Support System (IIDS). The EID database was an up-to-date repository of data about individuals encountered during law enforcement investigations and operations, while the IIDS database was described as "snapshot" of "a subset of data" from EID and was the "primary source of reporting and responding to FOIA requests for the [ICE analytical unit]." On a weekly basis, ICE runs a series of predefined queries in IIDS to generate specific "populations" of data corresponding to particular types of law enforcement actions. These populations, rather than the IIDS database as a whole are used to respond to FOIA requests, including TRAC's requests. ICE also indicated that "there is no single identifier for a particular individual that allows ICE to readily link data corresponding to that individual that exists in different populations." As a practical matter, that meant "there is no way to readily link data in separate populations to the same individual without conducting additional analysis to reconcile the differing identities, thus 'creating new data connections that did not exist previously.'" De Castro explained that while from 2011 to 2016, ICE had exercised its discretion to respond to requests requiring data manipulation, by 2017, responding to the growing number of such requests had become too burdensome.

TRAC argued that FOIA required ICE to search its databases, not subsets of data, for responsive records. Sannes agreed, noting that "it is undisputed that additional data responsive to Plaintiffs' request exists in the IIDS outside of the detainers population, including other populations, and prior to July 2016, ICE regularly produced this data to Plaintiffs. Notwithstanding that it *willingly* produced this data prior to July 2016, ICE maintains that it is not *required* under FOIA to continue to produce this data because the analysis would constitute records creation, ICE has not explained whether, as an alternative to searching for data within specific pre-generated populations and then conducting analysis to link that data to data in other populations, it is possible to simply query the IIDS as a whole for responsive data at the outset." She pointed out that "ICE has failed to explain how its search of the detainers population constituted a search of all files likely to contain responsive materials." Sannes indicated that ICE failed to address the issue of "whether there may be responsive data within the EID that is not in the IIDS."

Turning to the records creation issue, Sannes first noted that the EFOIA Amendments required courts to defer to agency determinations of the technical feasibility of providing requested electronic records. She pointed out that ICE's affidavit "*does* suggest that, given the lack of common identifiers for individuals across populations, the query necessary to respond to Plaintiffs' requests may need to go beyond these routine functions and conduct some type of substantive calculation or analysis to match identifiers in different populations that correspond to the same individual, thus merging data from these disparate populations to

create a comprehensive alien record that did not previously exist." She observed that, deferring to the agency, "it does appear that linking person-centric data from different populations requires additional analytical steps of some kind, and thus that the query ICE would need to conduct to create these links may cross the 'all-important line' between searching a database and creating a record."

Sannes indicated that the agency's current affidavits were insufficient to allow her to determine whether the TRAC's requests required ICE to create a record. She noted that "the fact that ICE routinely provided the 'linked' data Plaintiffs seek prior to July 2016, as well as unexplained inconsistencies in ICE's declarations regarding the time and resources required to fulfill Plaintiff's requests raise additional questions about whether ICE was legally justified in concluding that its former process for responding to Plaintiffs' FOIA requests – which it followed as a matter of course for years prior to July 2016, apparently without ever objecting to Plaintiffs' requests on the grounds they required unnecessary 'record creation' – actually had never been required of ICE in the first place. These questions are difficult to answer based solely on the high-level and conclusory explanations ICE has provided thus far, and without more concrete, particularized facts about what the 'queries' necessary to link data from different populations actually do." (*Susan Long and David Burnham v. United States Immigration and Customs Enforcement*, Civil Action No. 17-00506 (BKS/TWD), U.S. District Court for the Northern District of New York, Oct. 9)

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 rejecting a claim by the Pennsylvania Public Utility Commission had failed to show that records requested by Eric Friedman concerning the blast radius calculations for Energy Transfer (Sunoco Pipeline L.P.) Mariner HVL pipelines. Friedman attended a public meeting on pipelines in East Goshen with PUC representatives. In response to his question about blast radiuses, the PUC representative said the commission had a blast radius estimate in its hazard assessment reports pertaining to the pipeline. Friedman subsequently submitted a Right to Know Law request for records on blast radiuses to PUC. The agency denied his request entirely, indicating that the information was considered confidential security information. Friedman then filed a complaint with OOR. OOR found that PUC had not justified its claim that all responsive records qualified as CSI. PUC appealed, arguing that OOR did not have jurisdiction to determine whether PUC properly classified information as CSI. The appeals court agreed with PUC, noting that PUC "argues that OOR may review assertions by agencies as part of OOR's enforcement of the RTKL, but must defer to an agency's decisions regarding CSI since challenges to CSI designation must be heard before the agency holding the records. OOR may direct the requester to file a challenge of the CSI designation with the agency holding the records. In this case, the record does not indicate that Requester challenged the CSI designation directly with the PUC, instead relying on RTKL provisions and appealing the PUC's denial with OOR." The appeals court concluded that "while OOR may have determined that disclosure of the requested information was appropriate under the RTKL, if subject to redaction, OOR is not vested with the authority to administer the CSI Act, a PUC statute. Therefore, OOR lacked authority to determine that the requested information was not CSI." (*Pennsylvania Public Utility Commission v. Eric Friedman*, No. 980 C.D. 2019 and No. 982 C.D. 2019, Pennsylvania Commonwealth Court, Oct. 21)

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A court of appeals has ruled that the Office of Open Records properly determined that it did not have jurisdiction to consider Walter Smith's Right to Know Law request for records concerning his criminal record. Smith made a request for records from the Philadelphia Office of Judicial Records. After receiving no response from OJR, Smith complained to OOR. OOR told Smith it did not have jurisdiction to determine access to court records. Smith then filed suit. The court of appeals also rejected Smith's claims, noting that "we have consistently held that a court's filing office, such as a prothonotary's office, clerk of court's office, or, in this case, the OJR, are included within RTKL's definition of 'judicial agency.'" But the court pointed out that "even if the OJR did not respond to Petitioner's RTKL request, the OOR did not have jurisdiction over Petitioner's appeal. Had the request been subject to disclosure under RTKL, Petitioner should have directed his appeal to the OJR's designated appeals officer rather than the OJR." (*Walter Smith v. Philadelphia Office of Judicial Records*, No. 945 C.D. 2019, Pennsylvania Commonwealth Court, Sept. 25)

The Federal Courts…

The Second Circuit has ruled that §222(f) of the Immigration and Nationality Act encompasses visa revocations as well as applications and refusals. Saro Spadaro, an Italian citizen who lived on the Dutch Caribbean Island of St. Maarten, challenged the Department of State's decision to revoke his B-1/B-2 Visa, which he had used to travel extensively in the United States from 2000 to 2006. However, in 2008, he was told by State that his visa had been prudentially revoked. In 2013, Spadaro was told by two FBI agents that his visa had been revoked because he had been confused with his father, Rosario Spadaro, who had been implicated in insurance fraud and money laundering in connection with damage claims he made after Hurricane Lenny in 1999. The agents told him he could get his visa restored if he provided information on criminal activities or paid a $3 million civil forfeiture payment for his father's alleged crimes. The next year, DEA agents told Spadaro that he could get his visa restored if he provided information on criminal activities. After that time, Spadaro had trouble traveling abroad. He requested records about himself, specifically on the revocation of his visa. Agencies located 3,200 pages of responsive documents, but withheld 2,229 documents entirely, including 63 pages withheld by the State Department under **Exemption 3 (other statutes)**, Exemption 5 (privileges), and Exemption 7(E) (investigative methods or techniques). In its decision, the Second Circuit ruled only on the applicability of §222(f) to visa revocations. Section 222(f) provides that records "pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential. . ." The Second Circuit distinguished these circumstances from *Darnbrough v. Dept of State*, 924 F. Supp. 2d 213 (D.D.C. 2013), in which Judge Emmet Sullivan found that information in a database was not protected under § 222(f) because it did not apply to a visa application. Instead, the Second Circuit noted that "because there were visa applications submitted by Spadaro, and the government affirms, without dispute, that the withheld documents were reviewed for one or more of these applications, we conclude that the district court correctly determined that these documents fall within the scope of INA § 222(f) and are protected from disclosure under Exemption 3." The district court had relied on *Soto v. Dept of State*, 2016 WL 3390667 (D.D.C., June 17, 2016), in which Judge Randolph Moss had concluded that § 222(f) applied to visa revocations as well as applications and refusals, a ruling contrary to *El Badrawi v. Dept of Homeland Security*, 583 F. Supp. 2d 285 (D. Conn. 2008), the only relevant district court ruling in the Second Circuit. Agreeing with *Soto* the Second Circuit observed that "although the statutory language refers only to issuances or refusals on its face, the use of the word 'pertaining' makes clear that the reach of the statue is not so limited." The appeals court added that "applying that broad phrase to the circumstances here, it is clear that the revocation of a visa pertains to the issuance of a visa because they are so closely related – namely, a revocation constitutes as nullification of that issuance. Indeed, a visa can never be revoked without first being issued." The Second Circuit rejected *El Badrawi*'s conclusion that the canon of *expressio unius* – the explicit mention of one thing

is the exclusion of another left unmentioned – applied. Instead, the Second Circuit noted that "we rely upon cannons of construction only if the language of the statute is ambiguous, which is not the situation here." The court concluded that "even if we were to determine that the statute was ambiguous, the purpose of INA § 222(f) would dictate that the confidentiality of revocation documents be included within its scope." (*Saro Spadaro v. United States Customs and Border Protection, et al.*, No. 19-1157. U.S. Court of Appeals for the Second Circuit, Oct. 20)

A federal court in Massachusetts has ruled that the FTC has failed to show that records concerning its 2019 $5 billion settlement agreement with Facebook for allowing Cambridge Analytica to obtain Facebook users' data contains commercial information protected by either **Exemption 4 (confidential business information)** or **Exemption 3 (other statutes)**, citing the Federal Trade Commission Act. The court also found that because the agency had publicly identified Mark Zuckerberg as a target of the investigation, records identifying him were not protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Because the FTC had received more than 60 FOIA requests for the Facebook settlement agreement, the agency initially located 3,600 pages of responsive records. After giving Facebook an opportunity to review and comment on the records, the FTC agreed to withhold 3,000 pages because they contained confidential commercial information. The remaining pages were posted on the agency's website. The FOIA request was submitted by the law firm of Block & Leviton, representing the Employees' Retirement System of Rhode Island. In response to the law firm's FOIA request, the FTC referred them to the records on its website. The law firm filed an administrative appeal, arguing that commercial information was released as part of the 2011 draft settlement and was no longer protected by Exemption 4. The agency denied the appeal and the law firm filed suit. The agency then disclosed more records but continued to withhold 2,625 pages because they contained confidential commercial information. Turning to an assessment of Exemption 4, the court noted that "courts have cautioned that not all information submitted to the government by a commercial entity qualifies for protection under Exemption 4." The court indicated that "the FTC fails to explain document-by-document why each [record] contains 'commercial' information as commonly understood, which does not necessarily include all documents which hurt a company's reputation or the reputation of an executive. The *Vaughn* index appears to incorporate Facebook's objections whole-hog without any explanations to the Court so it can independently consider the applicability of Exemptions 3 and 4." The court pointed out that "because neither the FTC's *Vaughn* index nor [its affidavit] provides 'an adequate foundation for the Court to review whether each withheld document contains commercial information, summary judgment for Defendant is inappropriate." The court faulted the agency on the issue of whether the information had been "obtained from a person" as well. The court noted that "to the extent the FTC's proposals simply capture changes that are based on the content of negotiations with Facebook, those documents do not qualify as 'from a person.'" The court also agreed with the law firm that the dissenting statements of FTC Commissioners Rohit Chopra and Rebecca Kelly Slaughter identified Zuckerberg as a target of the investigation. As a result, the court pointed Rebecca Kelly Slaughter had identified Zuckerberg as a party of investigative interest. As a result, the court pointed out that "the official acknowledgment doctrine thus precludes the FTC from redacting Mr. Zuckerberg's name from the settlement documents under Exemption 7(C)." (*Block & Leviton, LLP v. Federal Trade Commission and Facebook, Inc.*, Civil Action No. 19-12539-PBS, U.S. District Court for the District of Massachusetts, Oct. 15)

A federal court in New York has ruled that the Department of Justice, including the Criminal Division and the FBI, as well as the National Security Agency, the CIA, and the Office of the Director of National Intelligence properly responded to FOIA requests from the Freedom of the Press Foundation and the Knight First Amendment Institute for records concerning surveillance targeting the news media, with the exception of

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Exemption 5 (privileges) claims by the Criminal Division. The media groups' request was prompted by undefined terms in DOJ's Media Guidelines regarding the use of law enforcement in relation to members of the news media. The FBI disclosed 506 pages, withholding 40 pages. The Criminal Division withheld two pages under Exemption 5. Judge John Koeltl rejected the Criminal Division's deliberative process privilege claims for two PowerPoint slides that the slides contained the personal opinions of the presenter. Noting that the agency sought to "stretch this Exemption too far," Koeltl pointed out that "while its earlier drafts may have merely reflected the personal opinions of the slide's author, the final version cannot reasonably be so limited. It was communicated to staff members with a warning that failure to follow its guidance could result in reprimand; as such, it cannot be construed as the subjective views of only an individual staff member." He observed that "the fact that hypotheticals or stylized examples are used to instruct staff members about a policy does not transform such materials into a deliberative work product." He noted that "instead, these slides – including the portion of the withheld hypotheticals slide – are the 'effective law and policy' of the agency." As to the other PowerPoint slide containing a News Media Consultation form, Koeltl indicated that the form "is a standardized form document including instructions with which DOJ staff members are expected to comply, in at least a certain set of circumstances. . .[T]he information that the agency has already decided staff members must submit, as part of the consultation process, is not" [protected]. Koeltl then rejected the Criminal Division's **foreseeable harm** claim, noting that "the release of this information will only reveal what factors the DOJ-CRIM, as a matter of its existing policy, has already instructed its staff members are relevant to the decision of whether an individual is a member of the news media." He added that "the disclosure of the instructions themselves is unlikely to have any negative impact on the potential for open, frank discussions." Koeltl then found the FBI had **conducted an adequate search**. He pointed out that "the plaintiffs have offered no authority which requires agencies to name each custodian searched, and the FBI provided a declaration with sufficiently detailed descriptions about how it approaches the search and identified which staff members might have access to responsive records." Koeltl also agreed that the FBI had properly invoked **Exemption 7((E) (investigative methods or techniques)**. He noted that "revealing the existence of such intelligence-gathering techniques or such squads, units or roles provide insights regarding the capabilities and level of focus the FBI applies to certain activities, which might assist criminals seeking to avoid such focus." (*Freedom of the Press Foundation and Knight First Amendment Institute at Columbia University v. Department of Justice, et al.*, Civil Action No. 17-9343 (JGK), U.S. District Court for the Southern District of New York, Oct. 9)

Judge Amit Mehta has ruled that the FBI has now justified its use of **Exemption 7(E) (investigative methods or techniques)** to withhold information from the security background check for Noel Whittaker. Whittaker worked as an analytical chemist for the NIH from 1974 to 2002. He then worked at the University of Maryland Department of Chemistry from 2002 to 2007. In 2007, he returned to NIH as a contractor. As part of that job, Whittaker underwent a background investigation. In 2014, he requested a copy of his background investigation from OPM. The agency released the report but redacted the National Agency Check results at the request of the FBI. After his appeal of the decision was denied, Whittaker filed suit. In his first ruling in the case, Mehta found the FBI had failed to explain what techniques would be disclosed if Whittaker's National Agency Check was released. However, he found the FBI's supplemental affidavit provided that level of explanation. Mehta indicated that "even in cases where the National Agency Check results contain no derogatory information, a requester could discover that the FBI lacks the methods necessary to capture or track the requester's illicit behavior. If the FBI were to reveal any specific techniques or procedures associated with Plaintiff's results, Plaintiff would be made aware of those methods' use as to his own activity, which would 'reduce or nullify their effectiveness.'" Noting that the FBI had provided an adequate explanation, Mehta observed that "these examples clearly go beyond mere regurgitation of the statutory standard for Exemption 7(E) and instead provide the court with the minimal explanation necessary to justify Defendants' withholding." He pointed out that "the name check results could reveal derogatory

information (or lack thereof) that could shed light on any number of different law enforcement techniques and procedures. Because Plaintiff currently has no sense of which techniques or procedures are intertwined with the name check results, Defendants risk reducing or nullifying the effectiveness of those techniques and/or procedures if they were to describe them with any greater specificity." He added that "disclosing information risks revealing the underlying techniques and procedures used to gather information about a person, and that is Defendants' ultimate – and valid – concern." Mehta also agreed with the FBI that the mosaic theory – disclosing apparently innocuous information could lead to a more complete picture that would undercut the use of the Exemption – applied. He noted that "although the court is not in a position to assess with precision the likelihood of Defendants' asserted harms, it is satisfied that Defendants have demonstrated *some* chance that disclosure of Plaintiff's name check results risks circumvention of the law via a mosaic effect." (*Noel F. Whittaker v. United States Department of Justice, et al.*, Civil Action No. 18-01434 (APM), U.S. District Court for the District of Columbia, Oct. 15)

Judge Ketanji Brown Jackson has ruled that the Department of Commerce has failed to show that it does not possess data files requested by journalist David Yanofsky. Yanofsky requested data files for the I-92 U.S. International Air Travel Statistics Program and the I-94 Visitor Arrivals Program. The agency eventually provided several data files containing standardized summary reports for these programs. Yanofsky argued that he wanted raw data concerning the two programs, but the agency claimed it did not own the data and that even if the data existed, it was not in a readable form. Yanofsky indicated that "the information that he was requesting under the FOIA was the data from the I-92 and I-94 programs that the DOC stored in its database, *i.e.*, 'the data *from which* both DOC's annual reports and customized reports are created.'" Brown Jackson noted that "the DOC's motion and attachments do not establish that the agency has produced the records that Yanofsky requested. The DOC maintains that it discharged its duties under the FOIA by releasing datasheets of its standardized summary reports. Based on this Court's review of the record, however, it appears that these summary reports do not contain all of the I-92 and I-94 data Yanofsky seeks, and that the DOC may in fact possess records that contain the non-aggregated data points that Yanofsky has requested." Having found the agency had failed to show that it did not possess the requested data, Brown Jackson indicated that Yanofsky had not carried his burden of proof either. She pointed out that "although the record suggests that the DOC may well maintain a database of anonymized, non-aggregated I-92 and I-94 data, the current record is insufficient to establish conclusively that the DOC possesses such records." Instead, Brown Jackson ordered both parties to provide supplemental affidavits to justify their positions. (*David Yanofsky v. United States Department of Commerce*, Civil Action No. 19-2290 (KBJ), U.S. District Court for the District of Columbia, Oct. 6)

Judge Beryl Howell has rejected researcher Ryan Shapiro's request that she reconsider her earlier ruling finding that the FBI and the Bureau of Alcohol, Tobacco and Firearms properly responded to 83 FOIA requests submitted by Shapiro. Rejecting Shapiro's Rule 54(b) motion to reconsider, Howell observed that plaintiff's failure to name which of the several possible bases for Rule 54(b) reconsideration applies to his case has a simple explanation – none of them apply." She noted that "instead, plaintiff's motion is a belated summary judgment surreply disguised as a Rule 54(b) motion." Shapiro argued that "if a privacy waiver has been submitted for a given individual, the FBI could not withhold that name under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He argued that the FBI withheld identifying information about some of those individuals who had provided privacy waivers. However, Howell found Shapiro assertions lacked any substantial evidentiary basis. She pointed out that "plaintiff has merely pointed to certain page numbers and alleged that he had likely submitted a privacy waiver for an individual whose name was redacted on those pages. With nothing in the summary judgment record substantiating that speculation,

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plaintiff has not overcome the presumptive exemption 'names and identifying information of third parties contained in investigative files' enjoy." She noted that "the only thing new about these filings is that he has attempted to support that contention with evidence. Despite having over four months to compile his cross-motion for summary judgment and despite no limitation being placed on his filings, that evidence was not produced until after the Court had made its decision." (*Ryan Noah Shapiro v. Department of Justice*, Civil Action No. 12-313 (BAH), U.S. District Court for the District of Columbia, Oct. 8)

Judge Colleen Kollar-Kotelly has ruled that the Executive Office for U.S. Attorneys **conducted an adequate search** for records in response to requests from John Petrucelli for untranscribed transcripts of his 2002 criminal trial arraignment in the Southern District of New York. In an earlier ruling, Kollar-Kotelly had questioned whether EOUSA had conducted an adequate search for audio tapes. This time, however, she found the agency's supplemental explanation sufficient. EOUSA indicated that it had retrieved sixteen boxes of records related to Petrucelli's trial and reviewed them for responsive records. The agency also contacted two Assistant U.S. Attorneys who worked on Petrucelli's case for any records. Both searches yielded no responsive records. Petrucelli argued that EOUSA should have contacted court reporters to search records. But Kollar-Kotelly noted that "plaintiff misapprehends FOIA, however. Apart from the fact that federal courts, which employ court reporters and manage PACER, 'are exempt from the reach of FOIA,' FOIA imposes no duty on EOUSA to produce records that it did not maintain, possess, nor control at the time of the request." (*John A. Petrucelli v. Department of Justice*, Civil Action No. 18-0729 (CKK), U.S. District Court for the District of Columbia, Oct. 15)

A federal court in California has ruled that VW failed to show it was entitled to intervene in FOIA litigation brought against the Department of Justice for records concerning the consent decree entered into by the company to settle charges that it had cheated to evade emissions standards for its diesel engines. Lawrence Kalbers, a professor at Loyola Marymount University, filed suit after DOJ withheld all records responsive to his FOIA request for records concerning the consent decree under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Judge Fernando Olguin found that VW's motion to intervene came too late. He indicated that VW's motion to intervene because it was unaware that DOJ might not protect its "unique interests" was disingenuous. Instead, he noted that "given DOJ's mandate to comply with FOIA, VW could never have reasonably believed that its 'unique interests' would be adequately protected by the DOJ at any stage of the proceedings in this case. In other words, if VW wanted to protect against the disclosure of documents in the DOJ's possession, it should've sought to intervene as soon as it learned of the lawsuit." Olguin then pointed out that because [the Environment and Natural Resources Division] gave Plaintiff's request an unduly narrow and therefore improper interpretation, its search for records responsive to the Request was inadequate." (*Lawrence P. Kalbers v. U.S. Department of Justice*, Civil Action No. 18-8439 FMO, U.S. District Court for the Central District of California, Oct. 9)

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