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Washington Focus: The Supreme Court heard oral argument in its only FOIA case this session, U.S. Fish and Wildlife Service v. Sierra Club, No. 19-547, which was also the first oral argument for recently confirmed Justice Amy Coney Barrett. The case involves whether a biological opinion prepared by FWS pursuant to the Endangered Species Act as part of a larger decision-making process overseen by the EPA is protected by the deliberative process privilege under Exemption 5 or whether it constitutes a non-privileged final opinion by FWS that must be disclosed. In its post on the oral argument SCOTUS Blog noted that "on balance, the justices' queries during oral argument appear to suggest agreement with the [agencies'] assertions that the documents were produced in 'the molten core of deliberative process' and thus protected. Yet only time will tell; indeed, it remains unclear whether the court will opt for a bright-line standard or a more fact-intensive inquiry about what qualifies as 'predecisional.'"

Two District Courts Award Expedited Processing

Two recent district court decisions granting expedited processing to the Brennan Center for Justice and the Protect Democracy Project provide some insights into the level of public interest required to convince courts to provide relief. While agency grants of expedited processing for FOIA requests concerning important newsworthy issues are not uncommon, litigation attempting to enforce the right to expedited processing is much less frequent. Part of that likely stems from a realization after the D.C. Circuit ruled in *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), in which the D.C. Circuit found that plaintiffs constructively exhausted their administrative remedies when an agency failed to provide a determination indicating how it intended to respond to a request and provided the right to appeal its decision, that the only remedy for an agency's violation of expedited processing was to sue the agency. The first case to reach that conclusion was *EPIC v. Dept of Justice*, 15 F. Supp. 3d 32 (D.D.C. 2014), in which Judge Ketanji Brown Jackson ruled that while EPIC had shown that it constructively exhausted its administrative remedies, its only recourse was to file suit and that, further, expedited processing did not entitle a plaintiff to have its FOIA request processed immediately before others already in line.

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That diminished potential remedy may strike some potential plaintiffs as not worth the effort.

However, the level of public interest in the records sought in both cases was high. The Brennan Center's request, which was sent to the Department of Commerce and eight other agencies, asked for records concerning the methodology used to calculate and report state-population totals for the Census, including the potential use of citizenship status. The Protect Democracy Project sent a request to the Department of Justice for records concerning communications with the U.S. Postal Inspection Service regarding participation in any DOJ voting or voting fraud task force.

Emphasizing the short deadline for receiving records pertaining to the Census, the Brennan Center asked all the agencies to provide expedited processing. When none of them had responded, the Brennan Center provided supplemental letters supporting its request for expedited processing. The Civil Rights Division and the Office of Legal Counsel at the Department of Justice granted the Brennan Center's request for expedited processing. The Brennan Center then filed suit, requesting Judge Timothy Kelly to issue an injunction requiring the agencies to completely respond by late January 2021. By the time Kelly ruled, all but a handful of agencies had granted the Brennan Center expedited processing and had agreed to process thousands of records on a monthly basis. PDP's request went to the Civil Rights Division, the Office of Information Policy, and the Criminal Division. Both the Civil Rights Division and OIP told PDP that unusual circumstances applied, and they would need to take more time to respond. However, both agencies were able to conduct searches and inform PDP that they had found no responsive records. The Criminal Division denied PDP's request for expedited processing. PDP then filed suit.

Kelly found that the Brennan Center had shown that it was entitled to expedited processing. He pointed out that the Brennan Center had shown widespread public interest in the issues, including more than 50 recent articles. He noted that "these articles raise questions about 'the Government's integrity,' which need not suggest any dishonesty or intentional wrongdoing on Defendants' part." The government argued that parts of the Brennan Center's request were too broad and did not focus on matters of widespread interest. Kelly disagreed, noting that "although this part will capture a broader set of documents, it still seeks records 'relating to the 2020 Census,' which includes matters 'of widespread and exceptional interests' that raise 'questions' about 'the Government's integrity.'"

He also agreed the Brennan Center had shown an urgency to inform the public. He observed that "here, the 2020 census and reapportionment processes are currently unfolding stories about federal government activity that are now the subject of public debate and discussion, but they will largely conclude early next year. Thus, delay would compromise the Brennan Center's significant interest in 'informing the public concerning actual or alleged Federal Government activity' related to the 2020 census and reapportionment." The government suggested that the fact that the Brennan Center had waited until nearer the end of the Census process to submit its request indicated a lack of urgency on its part. Kelly rejected that claim, noting that "as the Brennan Center points out, it if had requested records shortly after the President issued that order [to consider citizenship status], few responsive records would have existed. And nothing in the record suggests that the Brennan Center would have received expedited treatment a year ago and be much closer to receiving the records at issue had it requested them then."

Because of the short timeframe before the Census was statutorily required to be submitted to the President, Kelly ordered the agency to complete its responses by late January. He noted that "this is a rare case where after a date certain, the value of the information sought by the Brennan Center to inform the public about these matters would be materially lessened or lost. And without a preliminary injunction ordering production by that date certain, based on the estimates provided by Defendants, the Brennan Center will not receive responses to its requests in time to contribute to the public debate and discussion."

In the PDP litigation, Judge Emmet Sullivan found PDP had shown that it disseminated information to the public and that it had shown an urgency to inform the public. He noted that "because Plaintiff's request concerns a serious and time-sensitive matter, the Court finds that Protect Democracy also has likely satisfied [the urgency] requirement. First, regarding whether the FOIA request pertains to a 'matter of current exigency,' Protect Democracy explained that is request 'related to potential political interference by the Department of Justice with the U.S. Postal Service's preparations for processing the anticipated surge in voting by mail in light of the COVID-19 pandemic – an issue of utmost importance to the public.'" He added that "Protect Democracy's statement in its FOIA letter likely establish that the subject matter of its requested information – DOJ's potential interference with postal services – was a matter of 'current exigency,' particularly given the imminence of Election Day and the widespread media attention to the issue of voter fraud and slowed postal service deliveries." He observed that "with less than a week before Election Day, Protect Democracy is at risk of losing its ability to timely facilitate public awareness regarding the subject matter of its request."

Sullivan agreed that PDP had established that it would suffer irreparable harm if the processing of its request was not expedited. He pointed out that "the subject matter of Protect Democracy's FOIA request is time sensitive due to the impending election, in which voting is already underway. While the Court does not conclude at this time that any responsive communications must be processed prior to Election Day – after all, new voter fraud investigations may commence subsequent to that day, particularly in view of the state laws providing that certain mail-in ballots may be received and counted up to several days after Election Day." (*Brennan Center for Justice at NYU School of Law v. Department of Commerce, et al.*, Civil Action No. 20-2674 (TJK), US. District Court for the District of Columbia, Oct. 30; and *The Protect Democracy Project, Inc. v. United States Department of Justice*, Civil Action No. 20-2810 (EGS), U.S. District Court for the District of Columbia, Oct. 30)

Views from the States

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

New Hampshire

The supreme court has ruled that the Exculpatory Evidence Schedule, a list that contains the names of law enforcement officers who have been placed on the list because of credible allegations of misconduct, is not protected by the Right-to-Know-Law's personnel records exemption but that because the lower court did not consider whether the invasion of privacy exemption applied, the supreme court remanded the case for consideration of that issue. The Department of Justice argued that the provisions creating the list suggested that the personnel-related data fell under the personnel file exemption. However, the supreme court pointed out that the personnel files exemption "pertains only to information maintained in a police officer's personnel file." The supreme court added that "the express focus of [the personnel file exemption] is on information maintained in the *personnel file* of a specific police officer. Had the legislature intended [the exemption] to apply more broadly to personnel *information*, regardless of where it is maintained, it would have so stated." The supreme court also noted that EES did not qualify as a personnel file because the "EES is maintained by the DOJ, not by the police department's personnel office, and. . .DOJ does not employ officers on the EES." Turning to the application of the invasion of privacy exemption, the supreme court indicated that "the DOJ

asserts that, under our customary balancing test, disclosure of the EES would constitute an invasion of privacy. The trial court, however, did not rule upon DOJ's alternative argument, and we decline to do so in the first instance." (*New Hampshire Center for Public Interest Journalism, et al. v. New Hampshire Department of Justice*, No. 2019-0279, New Hampshire Supreme Court, Oct. 30)

Ohio

The supreme court has ruled that the high school records of Connor Betts, who killed nine people and wounded 27 others during a massing shooting in Dayton in 2019, are completely protected by the Ohio Student Privacy Act, the Ohio statute implementing and expanding the provisions of the federal Family Educational Rights and Privacy Act. Betts had graduated from Bellbrook High School in 2013. When media requests for Betts' high school records were denied by Bellbrook, which acknowledged that while the federal government generally interpreted FERPA rights to expire on death, "Ohio law offers broader protections for students' records," a media coalition filed suit, arguing that FERPA did not apply to Betts' records. The trial court ruled in favor of Bellbrook, finding that the Ohio Student Privacy Act protected the records. The media coalition appealed to the supreme court. The supreme court agreed with the lower court, noting that "because an educational institution may maintain information on former students no longer attending the educational agency or institution, such former students fall under FERPA's protections." The majority rejected the dissent's claim that the protections only applied to current students. Instead, the majority noted that "that would be a nonsensical reading of a statute specifically intended to bring Ohio into compliance with FERPA and to help ensure that Ohio schools can receive federal funds." (*Cable News Network, Inc., et al. v. Bellbrook-Sugarcreek Local Schools, et al.*, No. 2019-1433, Ohio Supreme Court, Nov. 5)

The Federal Courts…

A federal court in New York has ruled that the Air Force properly withheld the names of people taking tours of Air Force One and the names of people requesting tours on their behalf under **Exemption 6 (invasion of privacy)** in response to FOIA requests from BuzzFeed News, which focused on identifying several members of President Donald Trump's Mar-a-Lago club who were apparently given tours at Palm Beach in February 2017. BuzzFeed's primary argument was that the Supreme Court's decision in *Food Marketing Institute v. Argus Media Leader*, 139 S. Ct. 2356 (2019), in which the Court ruled that the plain language of Exemption 4 did not include the substantial competitive harm test, also stood for the proposition that agencies should not expand the breadth of exemptions. District Court Judge Andrew Carter disagreed, noting that "this argument does not persuade because there is no effort to import a constraint based on policy considerations here. Rather, this Court's conclusion is consistent with the Supreme Court's construction of 'similar files' in *Dept of State v. Washington Post*, 456 U.S. 595 (1982)." Finding that the privacy interests outweighed any public interest, Carter observed that "the protocol documents that BuzzFeed has already received indicate 'how [tours] are arranged' and indicate the category of individuals 'to whom access is granted based on these nonroutine invitations and personal connections.'" (*BuzzFeed, Inc. v. U.S. Department of the Air Force*, Civil Action No. 19-01337-ALC-SN, U.S. District Court for the District of Columbia, Nov. 3)

Judge Randolph Moss has ruled that U.S. Southern Command properly withheld records under **Exemption 3 (other statutes)** in responding to attorney James Connell's request for records concerning a change in legal personnel involved in trying Guantanamo Bay detainees, but that the agency had not yet justified its categorical use of **Exemption 6 (invasion of privacy)** to withhold identifying personal information. Connell asked for records relating to a conversation between Admiral Kurt Tidd and Harvey

Rishikof, the then-Convening Authority for Military Commissions, prior to Rishikof's removal from that role. While Southern Command cited other exemptions to justify its withholdings, Connell only challenged the redactions made under Exemption 3 and Exemption 6. Southern Command cited 10 U.S.C. § 130b, which allows the Secretary of Defense to withhold the names of members of the armed services assigned to an overseas unit, a sensitive unit, or a routinely deployable unit. Moss agreed the provision qualified as an Exemption 3 statute, observing that the provision "expressly overrides any contrary obligation imposed on the Department of Defense by FOIA by granting the Secretary discretion to withhold personally identifying information 'notwithstanding section 552 of title 5." He indicated that "the Southern Command has established that it was authorized to redact the names of individuals assigned to the unit in Guantanamo Bay," and pointed out that "plaintiff has failed to offer any factual basis to believe that the names of these individuals were improperly redacted pursuant to 10 U.S.C. § 130b." Turning to Exemption 6, Connell argued that he was only asking for the identities of senior officers. As a result, Moss indicated that Connell had waived any argument pertaining to identifying information of lower-level employees. However, Moss found that Southern Command had not sufficiently explained whether any of the redactions covered senior officials. He pointed out that "the possibility that the publicly available information *might* not include the individuals at issue here, and the conclusory assertion that none of the redactions pertain to individuals with policymaking authority, does not satisfy the Southern Command's burden of summary judgment. Among other things, the Court needs to know whether their names are, in fact, publicly available on the Southern Command website and the basis for [the agency's affidavit concluding] that none held policymaking positions." (*James G. Connell, III v. United States Southern Command*, Civil Action No. 18-1813 (RDM), U.S. District Court for the District of Columbia, Oct. 27)

Judge Dabney Friedrich has ruled that the CIA properly responded to Brandon Schneider's request for records concerning his 2003 application to join the agency by withholding a record pertaining to a criminal referral from the CIA to the Department of Justice under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)**. In response to Schneider's request, the CIA located 17 documents and released one document in full and four documents in part. By the time Friedrich ruled, the only issue remaining was whether the agency had properly withheld the criminal referral document in full. Friedrich found the agency had properly invoked the deliberative process privilege. She noted that "the government has demonstrated that revealing the contents of the document would 'inhibit the frank communications and the free change of ideas between federal agencies.' Because the document was both 'predecisional' and 'deliberative,' the CIA properly invoked FOIA Exemption 5 in withholding it." Friedrich agreed with the agency that Exemption 7(E) applied as well. She pointed out that "disclosing the document also may enable 'future applicants and those with intent to harm the government [to] tailor their responses during polygraph sessions and screening interviews to circumvent security procedures.'" She added that "'these individuals could then make unauthorized disclosures of such information and cause serious harm to national security.'" Because the government has sufficiently detailed both the information's law enforcement purpose and the risk that disclosure would circumvent the law, the CIA properly invoked FOIA Exemption 7(E) to withhold the criminal referral document." (*Brandon C. Schneider v. U.S. Department of Justice, et al.*, Civil Action No. 18-2294 (DLF), U.S. District Court for the District of Columbia, Oct. 28)

A federal court in California has granted the Small Business Administration a **stay** in litigation brought by the American Small Business League concerning the Paycheck Protection Program until Judge James Boasberg of the D.C. Circuit district court issues a decision in *WP Co. and Center for Public Integrity v. U.S. Small Business Administration*, a consolidated case that involves requests from the Post and CPI for the same records. ASBL resisted the agency's request for a stay, arguing its case should go forward on the merits.

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Ruling in favor of granting a stay, Judge Maxine Chesney noted that "the Court, in this instance, would need to consider not only ASBL's arguments but also the briefing submitted in two other cases, and particularly given the implication of third-party privacy interests, any such decision cannot be made solely on the basis of ASBL's arguments." She pointed out that "awaiting a ruling in the District of Columbia cases may well avoid the issuance of conflicting decisions. In particular, depending on how the District Court for the District of Columbia resolves the motions before it, either the requested PPP information will be disclosed, thereby potentially mooting ASBL's motion, or this Court will separately address the merits of ASBL's motion with the benefit of another district court's reasoning." Chesney granted the stay but told the agency to respond to ASBL's FOIA request no later than October 30. (*American Small Business League v. U.S. Small Business Administration*, Civil No. 20-04619-MMC, U.S. District Court for the Northern District of California, Oct. 26)

Judge Randolph Moss has ruled that a suit brought by American Oversight and Democracy Forward Foundation alleging that the Department of Veterans Affairs violated the **Federal Records Act** by failing to retrieve all emails sent by former Secretary David Shulkin on his personal email account. After allegations surfaced that Shulkin has extensive email exchanges with three Trump associates from his Mar-a-Lago club, American Oversight and Democracy Forward sent letters to the Secretary of the Department of Veterans Affairs and the U.S. Archivist, requesting they take action to retrieve copies of Shulkin's emails. Before filing a motion to dismiss, the government retrieved at least 53,000 pages of emails sent to or from Shulkin's personal account. Moss found the government had failed to establish that all responsive emails had been recovered. He pointed out that "although Shulkin has provided more than 50,000 pages of documents, the Court has no basis for determining how many total federal records his private emails accounts contained. These 50,000 pages might constitute all of the records that the agency needs to recover or only a fraction of them. Even at the time VA filed its reply brief, the agency was still in the process of determining 'what (if any) further actions are necessary to ensure that it has possession of all federal records from D. Shulkin.' In short, the case is not moot." The agency also argued that the case was not ripe for a decision because the process had not reached the point under § 706(1) of the FRA when an agency was required to enlist the aid of the Attorney General in retrieving documents. Moss indicated that the argument really didn't help the government's case under the current circumstances. Allowing American Oversight and Democracy Forward to continue with their suit, Moss observed that "for present purposes, however, what matters is that the facts required to answer the ripeness inquiry are the same facts required to answer the merits questions. And for that reason, the Court will withhold judgment of the ripeness question until later in the litigation once the parties have had an opportunity to develop the record with respect to both the Court's jurisdiction and the merits." (*American Oversight, et al. v. U.S. Department of Veterans Affairs, et al.*, Civil Action No. 19-2519 (RDM), U.S. District Court for the District of Columbia, Oct. 30)

In litigation brought by the NAACP Legal Defense & Educational Fund challenging violations of the **Federal Advisory Committee Act** by the Department of Justice by failing to issue a FACA charter for its Presidential Commission on Law Enforcement and Administration of Justice and ignoring the statute's balanced membership requirements, Judge John Bates has prohibited the Commission from issuing its final report unless it complies with FACA, or, alternatively, include a clear statement in its final report that its actions violated FACA. After finding that the Commission was made up entirely of law enforcement officials, the LDF filed suit under FACA, alleging that the Commission had violated the fairly balanced requirement and asking that the Commission's work be nullified as a result. Bates agreed with the LDF's allegations, noting that "defendants' FACA violations caused LDF's injuries, which stem from its inability to influence the Commission's work by scrutinizing the Commission's activities and having access to a representative voice on the Commission. Requiring a disclaimer gives LDF some input into the Commission's work by removing the appearance of legitimacy that attaches to advisory committee recommendations. And this requirement will

redress LDF's injuries more effectively than a declaratory judgement alone by ensuring that everyone who views the report is aware that it was produced in violation of FACA, even outside of the formal proceedings where LDF or others cite the declaratory judgement. Of course, this limited use injunction cannot give LDF access to a representative voice during past Commission meetings. But LDF will still gain significant relief and such 'gains are undoubtedly sufficient to give [LDF] standing.'" (*NAACP Legal Defense & Educational Fund, Inc. v. William P. Barr*, Civil Action No. 20-1132 (JDB), U.S. District Court for the District of Columbia, Nov. 2)

The Ninth Circuit has ruled that information disclosed pursuant to a FOIA request may constitute new information that can be used in a securities fraud suit brought by investors against BofI Holding, Inc. BofI Holding denied to investors that it was the subject of an investigation by the SEC for money laundering. To bolster its claims, the investors' group relied on two articles, one of which relied on information disclosed pursuant to a FOIA request while the other article appeared on a website called *Seeking Alpha*. The district court concluded that the plaintiffs had adequately alleged the falsity of BofI Holding's statement, but failed to adequately allege loss causation, primarily because the information obtained pursuant to the FOIA request could not be a corrective to disclosure of any misrepresentation. The district court found as a matter of law that the information obtained pursuant to the FOIA request was publicly available. The Ninth Circuit disagreed, noting that "information must be requested before it can be received through the FOIA. Information acquired through FOIA does not simply reside on a shelf somewhere, ready for the taking." The Ninth Circuit pointed out that "given FOIA's general framework, the fact that a market actor lodges a FOIA request on a given date does not allow the conclusion that the information became publicly available on that date because FOIA requests do not always result in disclosures – and even when they do, the disclosure are not instantaneous. At a minimum, there must be some indication that the relevant information was requested and produced before the information contained in a FOIA response can be considered publicly available for purposes of loss causation. For those reasons, the district court erred by concluding as a matter of law that an article containing information obtained through the FOIA could not qualify as a corrective disclosure for purposes of establishing loss causation." (*David Grigsby, et al. v. BofI Holding, Inc., et al.*, No. 19-55042, U.S. Court of Appeals for the Ninth Circuit, Nov. 3)

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