Volume 46, Number 23
December 2, 2020

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

Editor/Publisher:
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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: Chief Judge Beryl Howell disclosed a heavily redacted ruling Nov. 30 revealing the existence of an investigation of an attempt to secure a pardon from President Donald Trump. POLITICO Reporter Josh Gerstein noted that the ruling "granted prosecutors permission to examine emails involving lawyers and an effort to seek a pardon for someone whose name was deleted from the public version of the opinion." Howell's opinion indicated that the involvement of a non-lawyer and a lawyer she described as an "attorney advocate" who did not appear to be providing legal services voided the attorney-client privilege. She explained that "the attorney-client privilege does not protect communications disclosed to third parties."

Court Rules Farm-Related Data Protected by Exemptions 3 and 6

Judge Timothy Kelly has ruled that the Department of Agriculture properly withheld identifying information in response to seven FOIA requests from Telematch, Inc. (d/k/a/ Farm Marked ID (FMID), which collects, maintains, and analyzes agricultural data from various sources, including the federal government, under Exemption 3 (other statues) and Exemption 6 (invasion of privacy). The opinion is the latest example of a continued narrowing of the ability to obtain data that could disclose identifying information about family farms, a distinction that is still unsettled as to the coverage of Exemption 6. However, in recent years, agencies have had access to an Exemption 3 statute specifically designed to broadly protect much of this information and allow agencies like the Farm Service Agency, the agency that received and processed FMID's requests, to withhold geographical data that could reveal the size of such farms.

FMID's requests focused on Farm Numbers, Tract Numbers, and Customer Numbers. Farmer and Tract Numbers are assigned to land enrolled in USDA programs and are used to identify, for instance, the number of acres planted with a particular crop, or the location of conservation practices or geographical features. Customer Numbers are unique identifiers USDA assigns to individuals or entities in USDA databases. Customer Numbers are used to identify program participants and to help provide and administer farm loans,

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crop insurance, and disaster assistance compensation. Customer Numbers, like Farm and Tract Numbers, can be used to connect other USDA data. FMID's seven requests focused on a variety of data, all of which included Farm, Tract and Customer Numbers. The Farm Service Agency responded to all the requests but redacted data that identified Farm, Tract, and Customer Numbers under Exemption 6 and Exemption 3, citing 7 U.S.C. § 8791(b)(2) of the Food, Conservation, and Energy Act of 2008, which protects "(A) information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of the Department" and "(B) geospatial information otherwise maintained by the Secretary about agricultural land or operations."

Kelly agreed that the FCEA provision qualified as an Exemption 3 statue and that, further, the Farm and Tract Number data withheld by the agency fell within the provision prohibiting disclosure of geospatial data. He explained that "applying this definition, Farm and Tract Numbers are geospatial information. Like GPS coordinates, they refer to specific physical locations; in this case, they refer to polygons representing physical boundaries of plots of land on Earth. FMID argues that, because the numbers are 'simply alpha-numerical codes that the USDA creates and assigns,' they are not geospatial information. But *any* system of identifying specific geographic locations – including, for example, GPS coordinates – must ultimately be designed and implemented by someone."

Kelly then found that the Customer Number data was protected by Exemption 6. He began by noting that "there is no dispute that Customer Numbers apply to individuals or entities that have a record in a USDA database. Moreover, USDA has shown that, with the aid of publicly available information, the public can connect Customer Numbers to those individuals or entities and reveal their personal information." He indicated that "because tying Customer Numbers to these public records can reveal the above information, including 'at least a portion of the [farm] owner's personal finances,' the Court finds that they are 'similar files' for the purposes of Exemption 6."

He observed that "true, the Customer Numbers by themselves disclose nothing about an individual farmer to the public, including the farmer's identity. But the disclosure of the numbers, when combined with other public data, could lead to identification of individual farmers and reveal information about their farms and financial status. For this reason, Custom Numbers implicate a privacy interest under Exemption 6."

FMID argued that disclosure was in the public interest because the data could be used to determine whether USDA was overpaying program participants, or to help root out fraud. However, Kelly rejected those claims. He first noted that "the Court has already held that Farm and Tract Numbers are excepted from disclosure under Exemption 3 because they are geospatial information. FMID does not explain how releasing only Customer Numbers could inform the public about USDA's program administration; all its examples rely on the release of all three numbers together." He pointed out that "there is no evidence in the record to support FMID's allegations of fraud in USDA programs. And baseless allegations of fraud do not support finding a public interest for purposes of Exemption 6 disclosure."

Rejecting FMID's public interest arguments, Kelly noted that "it is possible that Customer Numbers could benefit the public by revealing information about program participants combined with already publicly available information. FMID, however, makes no argument that such retroactive matching would serve the public interest. And when analyzing an agency's invocation of Exemption 6, a court 'need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time.'"

FMID had also alleged that FSA had a policy or practice of failing to respond to FOIA requests, citing the recent D.C. Circuit decision in *Judicial Watch v. Dept of Homeland Security*, 89 F.3d 770 (D.C. Cir. 2018), in which the D.C. Circuit found that the Secret Service consistently ignored the timelines for responding to

Judicial Watch's requests, forcing Judicial Watch to file suit. Instead, Kelly noted that "USDA has not engaged in similar conduct here. Unlike the Secret Service in *Judicial Watch*, USDA responded to FMID's requests before it filed suit, as opposed to waiting until afterward. And there is no indication that USDA is using the 'filing of a lawsuit as an organizing tool for setting its response priorities.' Indeed, USDA's organizing principle in processing FOIA requests and appeals is to do so on a 'first-in, first out basis.'" Kelly also found FMID's policy or practice claim fell short because he had found the agency's exemption claims in the seven FOIA requests at issue were proper. He pointed out that "thus, they cannot be the basis for any purported future injury." (*Telematch, Inc. v. United States Department of Agriculture*, Civil Action No. 19-2372 (TJK), U.S. District Court for the District of Columbia, Nov. 27)

Views from the States

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

Illinois

A court of appeals has ruled that the Navy Pier, Inc. performs a governmental function for the Metropolitan Pier and Exposition Authority and that, as a result, the NPI was required to provide non-exempt records to the Better Government Association in response to its FOIA request but that the trial court correctly found that NPI did not operate as a subsidiary body of MPEA for purposes of constituting an agency for purposes of FOIA. In 1989, the Illinois General Assembly created the MPEA to promote and operate expositions in Chicago, to include the redevelopment and use of the Chicago Navy Pier for such purposes. In 2010, the trustee of MPEA recommended that MPEA transfer operation of the Navy Pier to a private non-profit corporation. MPEA leased the Navy Pier to NPI for 25 years at a cost of $1 a year. MPEA also granted NPI $220,000, loaned it $5 million for start-expenses and gave NPI $115 million to use to improve the property. In 2014, BGA submitted a FOIA request to both MPEA and NPI for records related to the operation of the Navy Pier. MPEA provided some records and told BGA that it did not possess others. However, NPI denied the request, contending it was not an agency subject to FOIA. The trial court ruled that MPEA had hired NPI to perform a governmental function and the MPEA was required to provide records pertaining to that function. The trial court also concluded that since NPI was not a subsidiary body of MPEA, it was not itself directly subject to FOIA. Both parties appealed. The appeals court began by noting that the Illinois Supreme Court had concluded, in *Better Government Association v. Illinois High School Association*, 89 N.E. 3d 376 (Ill 2017), that a governmental function was defined as conduct by a government agency that was expressly or implicitly permitted by a constitution, statute or other law. The appeals then noted that MPEA and NPI argued that they did not fit that definition. But the appeals court observed that "if MPEA and NPI mean to argue on policy ground that courts should not so define 'governmental function,' they should present the argument the General Assembly. We apply the definition our supreme court set out in *IHSA*. Because NPI fulfills the duties the General Assembly assigned by statute to MPEA, NPI performs a governmental function." The appeals court added that "MPEA, as a public body, bears the burden of proving that records requested fall within an exemption. MPEA has not attempted to meet that burden." The appeals court then found that NPI did not qualify as a subsidiary body of MPEA. The appeals court noted that "where the $115 million served to improve the value of MPEA's property, and not to fund NPI's operations, we do

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not construe that contribution as public funding of NPI. The trial court's finding concerning the public funding factor is not against the manifest weight of the evidence." (*Better Government Association v. Metropolitan Pier and Exposition Authority, et al.*, No. 1-19-0697, Illinois Court of Appeals, First District, Nov. 30)

The Federal Courts…

A federal court in New York has ruled that it has **jurisdiction** to determine whether the intelligence community agencies must respond to Douglas Cox's FOIA request for the report written by the Senate Select Committee on Intelligence critical of the government's use of torture during the war on terrorism. The agencies argued that the D.C. Circuit, in *ACLU v. CIA*, 823 F.3d 655 (D.C. Cir. 2016), had concluded that because the SSCI had indicated its intention to maintain custody and control over the report, it was a congressional record and not an **agency record** subject to FOIA. Cox argued that the standard articulated in *ACLU v. CIA* was contrary to the Supreme Court's decision in *Dept of Justice v. Tax Analysts*, 892 U.S. 136 (1989), in which the Court established a control test for determining when a record qualified as an agency record. However, Chief Judge Roslynn Maukopf of the Eastern District of New York explained that "before the Court is the narrow question of the proper test for agency 'control' of the documents obtained from Congress. This is a question with its own unique constitutional considerations – and a question not before the Court in *Tax Analysts*." While she agreed that Congress had a constitutional right to make access decisions that differed from those contained in FOIA exemptions, after reviewing two letters that were part of the correspondence related to control of the torture report, Maukopf noted that "both of these letters provide compelling evidence that SSCI intended to 'relinquish control' over the SSCI Report upon transmittal." The agencies argued that while the SSCI intended to declassify the executive summary of the report, it did nothing to indicate a desire to give up control of the rest of the report. However, Maukopf pointed out that "while this provides some evidence that the SSCI *did not* intend to control the Executive Summary, the Court finds little support in this action alone for the conclusion that the SSCI intended to retain control over the non-Executive Summary portions of the SSCI Report." After finding she had jurisdiction to hear the merits of the case, Maukopf indicated that the *Vaughn* indices submitted by the FBI, the CIA, and other agencies making claims under **Exemption 1 (national security)** and **Exemption 5 (privileges)** were insufficient. She ordered the agencies and to provide more detail. (*Douglas Cox v. Department of Justice, et al.*, Civil Action No. 17-3329 (RRM)(RLM), U.S. District Court for the Eastern District of New York, Nov. 30)

Judge James Boasberg has rejected the Small Business Administration's request to **stay** his order requiring the agency to disclose much more data about its Payroll Protection Program loans, which the agency had argued was protected by **Exemption 4 (confidential business information)** and **Exemption 6 (invasion of privacy)** until the agency has decided whether or not to appeal to the D.C. Circuit. While Boasberg noted the agency still had another week in which to decide to appeal to the D.C. Circuit, he expressed little sympathy with the agency's position. He observed that "even if SBA can make out some showing of irreparable harm in the absence of a stay – as the Court is willing to assume – any such injury is substantially outweighed by the harm to Plaintiffs and the public at large should the Court put its Order on ice." He found the public interest in disclosure was clear. He noted that "SBA approved a whopping $717 billion in taxpayer-funded loans pursuant to the [two] programs. Disclosure of the complete list of borrowers and precise loan amounts would facilitate 'meaningful evaluation' of the government's activities – specifically, whether the programs 'are being operated consistent with applicable legal constraints; whether funds have been distributed equitably, and devoid of fraud; and whether the programs are achieving their purpose.' These concerns, moreover, are far from hypothetical. Plaintiffs have invoked alleged inequities in loan allocation, highlight well-documented

allegations of fraud, and pointed to the government's own admission that its COVID-related loan program were subject to abuse." He added that "the *public* no doubt maintains an independent, pressing interest in identifying fraud against the government – especially when hundreds of billions of taxpayer dollars are involved." (*WP Company LLC, et al. v. U.S. Small Business Administration*, Civil Action No. 20-1240 (JEB) and *Center for Public Integrity v. U.S. Small Business Administration*, Civil Action No. 20-1614 (JEB), U.S. District Court for the District of Columbia, Nov. 24)

A federal court in California has ruled that the U.S. Immigration and Customs Enforcement properly responded to FOIA requests submitted by the Transgender Law Center pertaining to the death of Roxsana Hernandez, a 33-year-olc transgender woman who died in ICE custody on May 25, 2018, two weeks after entering the United States. The first request yielded 1,591 records over 11 productions, while the second request resulted in five productions totaling 158 pages. The agency withheld or redacted records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. Although she ultimately agreed with ICE that its search was adequate, Magistrate Judge Sallie Kim sharply criticized the agency for its substantial delay in responding. She noted that "the Court finds that Defendants' delay here – which stopped only when a lawsuit forced their hand – abused the FOIA process. The public interest in access to records is significant, and the Court finds that Defendants' delay damaged Plaintiff's ability to speedily access information in this case and that this type of delay is likely to recur, particularly based on the issues regarding lack of resources or allocation of resources that Defendants' counsel identified during the course of these proceedings. The Court therefore grants Plaintiffs' request for declaratory judgment that Defendants failed to timely respond to Plaintiff's FOIA requests." Kim then found the agency had **conducted an adequate search**. She observed that "the law is clear that courts reviewing FOIA productions must look to the methodology underlying the search, rather than the completeness of the resulting production, to determine adequacy. Defendants' methodology was appropriate and reasonably calculated to reveal the relevant records which Defendants have produced." Kim found the agency had properly withheld records under the deliberative process privilege. While the Transgender Law Center argued that the agency was required to separate and disclose facts, Kim pointed out that "it is well-established that factual material may be withheld as deliberative material when – as here – it is so thoroughly integrated with deliberative materials that its disclosure would expose or cause harm to the agency's deliberations." She approved the agency's attorney-client privilege claims as well. She noted that "it includes confidential communications between an agency attorney and agency clients for the purpose of securing legal advice regarding ICE's response regarding the death of Hernandez." Kim also approved the agency's withholding claims under the privacy and investigative methods exemptions. (*Transgender Law Center, et al. v. United States Immigration and Customs Enforcement*, Civil Action No. 19-03032-SK, U.S. District Court for the Northern District of California, Nov. 24)

Judge Tanya Chutkan has ruled that the FBI properly withheld records under **Exemption 3 (other statutes), Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods or techniques)** in response to a FOIA request from Judicial Watch for records concerning 12 FD-302 interviews conduct of Bruce Ohr, the Director of the Department of Justice Organized Crime Drug Enforcement Task Force as part of the Mueller investigation. The FBI cited Section 102A(i)(1) of the National Security Act, protecting sources and methods. Approving the exemption claim, Chutkan noted that "it is not difficult to see how releasing such information could endanger national security or the efficacy and safety of intelligence operatives in the field." She pointed out that "disclosure would hamper the agency's ability to conduct investigations by 'presenting a bona fide opportunity for individuals to develop and implement

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countermeasures, resulting in the loss of significant intelligence information, sources, and methods relied upon by national policymakers.'" Judicial Watch argued the FBI did not explain how methods or techniques could be revealed. However, Chutkan noted that "this argument ignores the low hurdle the FBI faces when relying of the National Security Act for Exemption 3, and the fact that the intelligence activity or methods are the kind of information the FBI – and the National Security Act – seeks to protect." Turning to Exemption 7(D), Chutkan agreed with the FBI that "the source would not have provided the information described absent an implied assurance of confidentiality." She added that "given that the source was in a unique position to provide information that would place them in the crossfire of two global superpowers, it is difficult to imagine that they would have provided such information without an assurance of confidentiality." Judicial Watch argued that the source revealed in Ohr's testimony had been publicly revealed in congressional testimony. Chutkan rejected the claim, noting that "it appears that the source in question has not been revealed, which further supports the court's conclusion that the individual's identity should be protected." (*Judicial Watch v. U.S. Department of Justice*, Civil Action No. 18-2107 (TSC), U.S. District Court for the District of Columbia, Nov. 25)

A federal court in Oregon has ruled that the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service failed to show that they had properly responded to a request from the Western Resources Legal Center for ten categories of records related to the NMFS document entitled Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, specifically information cited in the final version of the Technical Guidance, including scientific documents, studies, and reports. The search was assigned to NFMS's Office of Protected Resources. OPR's first document release was in July 2017 and its seventh and final response was dated August 2019. The agency argued that WRLC **failed to exhaust its administrative remedies** by filing suit after the agency had provided a determination as to how it would respond to its request. The court rejected the claim, noting that "NOAA did not issue a determination within the thirty days permitted under the statute, and therefore, failed to trigger WRLC's duty to exhaust administrative remedies." The court also faulted the agencies for their lack of a prompt production of records. Here, the court observed that "once NOAA missed the statutory deadline for making a determination, WRLC was free to file an action in district court without exhausting administrative remedies. After acknowledging WRLC's request in December 2016, NOAA did not provide records for more than seven months." The court agreed with WRLC that the agency's decision to limit its search to ten employees was inadequate. The court noted that "NOAA fails to establish that it identified all relevant custodians because its declarations do not adequately explain why it limited the search to certain custodians." (*Western Resources Legal Center v. National Oceanic and Atmospheric Administration, et al.*, Civil Action No. 19-0119-AC, U.S. District Court for the District of Oregon, Nov. 20)

Resolving most of the remaining issues, a federal court in New York has ruled that two disputed documents withheld by the EPA in response to a FOIA request from the Natural Resources Defense Council are not protected by **Exemption 5 (deliberative process privilege)**, but the EPA has shown that its **segregability analysis** for the remaining 64 documents was appropriate. District Court Judge Jesse Furman noted that "much like the Messaging Records at issue in the Court's earlier opinion, the EPA does not sufficiently demonstrate that these decisions on how to comply with its own guidance on compiling a rulemaking docket (1) are actually exercises of the EPA's 'essential *policymaking* role' in and of themselves or (2) would 'reflect internal agency deliberations on matters of *substantive policy* prior to public announcement of those decisions.'" Furman rejected the NRDC's request to review the remaining records *in camera* to assess the agency's segregability determinations. He noted that "to hold an agency's willingness to reconsider its determinations against the agency when reviewing its later determinations would disincentivize reconsiderations by agencies, thereby undermining the ultimate goal of promoting the disclosure of records

where an exemption does not apply." (*Natural Resources Defense Council v. U.S. Environmental Protection Agency*, Civil Action No. 17-5928 (JMF), U.S. District Court for Southern District of New York, Nov. 24)

A federal court in Washington has ruled that the Department of the Navy **conducted an adequate search** in response to four requests submitted by the National Parks Conservation Association for records concerning noise and other impacts associated with Naval exercises on or above Olympic National Park, Olympic National Forest, and the Olympic Peninsula. NPCA argued that the Navy had not justified its exclusion of certain National Environmental Policy Act "preparers" as part of its search. But the court agreed with the agency, noting that "that they are unlikely to possess relevant documents is supported by the job descriptions on plaintiff's list, which indicate that the areas of responsibility for at least thirteen individuals are or might likely be outside the Olympic Peninsula. . ." The court agreed with the agency's **Exemption 5 (privileges)** claims, finding the agency had properly invoked the attorney-privilege, the attorney work-product privilege, and the deliberative process privilege. In arguing that the exchanges with contractors were not protected under the deliberative process privilege, NPCA cited the recent Ninth Circuit decision, *Rojas v. FAA*, 927 F.3d 1046 (9th Cir. 2019), in which a split panel had ruled that the consultant corollary was contrary to the "inter- or intra" threshold of Exemption 5. However, the district court noted that the Ninth Circuit had agreed to rehear *Rojas* en banc, meaning the decision had been vacated. With that impediment gone, the district court pointed out that "the types of communications occurring between the Navy and its contractors in this matter are the equivalent of intra-agency discussions, and they are protected from disclosure by FOIA Exemption 5." The Navy had also withheld names of some preparers under **Exemption 6 (invasion of privacy)**. NPCA argued that the NEPA regulations required preparers to be identified. The court found that the agency had not satisfactorily explained its basis for the redactions and ordered the agency to provide more explanation. The court noted that "the public has no interest in knowing the identities of record custodians other than the three project managers primarily responsible for the NEPA documents at issue. . ." (*National Parks Conservation Association v. U.S. Department of the Navy*, Civil Action No. 19-645-TSZ, U.S. District Court for the Western District of Washington, Nov. 20)

Judge Emmet Sullivan has ruled that the Department of Commerce has provided sufficient justification for the **foreseeable harm** standard under **Exemption 5 (privileges)** in response to a FOIA request from Judicial Watch for communications between Thomas Karl, a scientist at the National Oceanic and Atmospheric Administration, and John Holdren, director of the White House Office of Science and Technology Policy, from January 2009 and January 2017. In response to Judicial Watch's request, NOAA found 900 pages of responsive documents. By the time Sullivan ruled, the only issues remaining in dispute were redactions made in 48 documents. In justifying its foreseeable harm claims under the deliberative process privilege, NOAA argued that scientists were fearful of having their personal scientific opinions taken out of context. Sullivan found this explanation sufficient. He noted that "the explanation does not repeat the justifications for withholding the information provided in the [agency's *Vaughn* index], but rather describes the specific harms to the deliberative process that would result from the disclosure of the information. Commerce has taken a categorical approach, but the harms Commerce has articulated are far from 'generic and nebulous.'' Furthermore, these harms are connected in a meaningful way to the information being withheld because of the predecisional and deliberative nature of the information." Judicial Watch argued that the agency had not met the foreseeable harm standard. But Sullivan pointed out that "Commerce has met its burden of articulating the foreseeable harm disclosure of the information would have on the ability of agency scientists to 'engage in meaningful scientific debate and collaboration' to arrive at 'quality agency decisions.' This is entirely distinguishable from withholding information that could embarrass an agency or paint it in a

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negative light." (*Judicial Watch, Inc. v. U.S. Department of Commerce*, Civil Action No. 17-1283 (EGS), U.S. District Court for the District of Columbia, Nov. 25)

Judge Tanya Chutkan has ruled that the National Institute for Standards and Technology properly withheld data modeling analyses of the collapse of WTC 7 in the aftermath of the terrorist attacks on 9/11 under **Exemption 3 (other statutes)** in response to a request from David Cole. Cole submitted a FOIA request for "the input data and the original analyses for the seated connection at column 79." The search was performed by the Deputy Director of the Building and Fire Research Laboratory and overseen by Catherine Fletcher, NIST's FOIA/Privacy Act Officer. The agency located 35,394 pages of responsive records but withheld them entirely under 15 U.S.C. § 7306(d) of the National Construction Safety Team Act. The agency also told Cole that there were no **segregable** records. Cole filed an administrative appeal, which was denied. Cole then filed suit, arguing that the agency had interpreted his request too narrowly. Cole contended that NIST should have read "input data" to mean "information that existed independent of the computer and the modeling and was data taken from paper or other electronic records containing it prior to the modelling being conducted." By contrast, NIST interpreted the request to refer to "the data that was input into the computer models" to drive the models' analysis. Chutkan sided with the agency, noting that "Cole's attempts to reframe his request and appeal at this stage are unavailing, and the court finds that NIST's interpretation of the scope of Cole's FOIA request was reasonable. If Cole seeks information other than the data that was fed directly into NIST's models, he may submit a new FOIA request identifying those records with requisite particularity." Turning to the Exemption 3 claim, Chutkan pointed out that "Fletcher explained that the specific detailed models of WTC 7 are beyond the current state of public knowledge and therefore 'if the files were disclosed, it would publicly disseminate tools that could be used to predict the collapse of a building which would provide technical instruction on how to more effectively devise schemes to destroy large buildings.'" Cole argued that the agency could have provided a screenshot of the data that would not disclose any protected information. Chutkan rejected that claim, noting instead that "the computer modelling data used in NIST's investigation of the WTC 7 collapse was exempt under the NCSTA Section (d) and FOIA exemption 3; despite Cole's argument to the contrary, the agency was under no obligation to create entirely new records in order to remove some data from this exemption." (*David Cole v. Dr. Walter G. Copan*, Civil Action No. 19-1182 (TSC), U.S. District Court for the District of Columbia, Nov. 30)

The Fourth Circuit has ruled that the district court properly dismissed a suit brought by the Humane Society, the Center for Biological Diversity, and Born Free USA alleging that the U.S. Fish and Wildlife Service violated FOIA's Section (a)(2) **affirmative disclosure** provisions. The public interest organizations claimed the agency failed to post electronic copies of the records they requested, refused to comply with the disclosure requirements, and failed to properly index its [Endangered Species Act] documents. The district court dismissed the suit after finding that the requests for posting were **moot** because the requested documents had been posted, and that the groups failed to state a claim with regard to the prospective posting of materials on an ongoing basis and the proper indexing of such materials. The Fourth Circuit agreed with the district court's conclusions. On the mootness issue, the Fourth Circuit was skeptical of the groups' claim that the agency had failed to post documents listed in a binder that groups produced at oral argument. The Fourth Circuit noted that "Appellants have not alleged (and do not argue on appeal) that the requests they made and the documents they turned over in the binder meet the requirements for posting to the eFOIA reading room. And to the extent Appellants fault Appellees for posting materials in dribs and drabs, they have also admitted that some of these disclosures were in response to *their own successive requests* made after filing of the initial complaint." Turning to the prospective posting claim, the Fourth Circuit pointed out that "in this case, FOIA does not entitle Appellants to the prospective relief they seek as to documents *not yet in existence*. FOIA provides that the district court 'has jurisdiction to enjoin the agency from withholding agency records and to

order the production of any agency records improperly withheld from the complainant.'" As to the indexing claim, the Fourth Circuit observed that "there is no reasonable reading of the remedial provision that demonstrates entitlement to relief based on the sufficiency of a FOIA index. In any event, the statue requires a 'general index,' which it does not define. The records in this case are delineated by species, and Appellants cite no persuasive authority that this is somehow insufficient." (*Humane Society of the United States, et al. v. United States Fish and Wildlife Service*, No. 19-1678, U.S. Court of Appeals for the Fourth Circuit, Dec. 1)

Judge Emmet Sullivan has ruled that a suit brought by the Lawyers' Committee for Civil Rights and the National Women's Law Center against OMB for records concerning the agency's decision to halt an initiative previously approved by OMB in the Obama administration for the collection of pay data from employers by the Equal Employment Opportunity Commission should be held in abeyance until OMB provides a supplemental affidavit to justify its **foreseeable harm** claims under **Exemption 5 (deliberative process privilege)**. Sullivan noted that "neither party has briefed the Court on Whether [OMB's] affidavit together with the *Vaughn* index satisfies OMB's burden to meet the foreseeable harm standard." (*Lawyers' Committee for Civil Rights, et al. v. U.S. Office of Management and Budget*, Civil Action No. 18-0645 (EGS), U.S. District Court for the District of Columbia, Nov. 24)

A federal court in Minnesota has ruled that Nico Ratkowski, an attorney at the immigration law firm of Contreras & Metelska, is not entitled to **attorney's fees** for his FOIA suit against the Executive Office for Immigration Review for records concerning a federation agreement between EOIR and U.S. Immigration and Customs Enforcement pertaining to the scheduling of immigration hearings. After seeing an announcement from the American Immigration Lawyers Association indicating that the Department of Homeland Security was moving to a new computer scheduling system for immigration hearings, which included a reference to an EOIR-ICE federation agreement allowing ICE personnel to use a single sign-on, Ratkowski submitted a FOIA request in December 2019 to EOIR for the federation agreement. EOIR told Ratkowski that his request qualified for unusual circumstances and referred his request to the Justice Management Division, which coordinated with ICE to locate the federation agreement. The entire process was also complicated by the pandemic. JMD disclosed a redacted version of the federation agreement in June 2020. Ratkowski then filed a motion for attorney's fees, arguing that his suit caused the agency to respond more quickly. The court disagreed, noting that "while Defendants provided the responsive document after the filing of this lawsuit, that fact alone fails to show that Plaintiff's lawsuit substantially caused Defendants to provide the document. While Plaintiff speculates about ICE's 'hasty' response once litigation commenced, and the timing of DOJ's workplace response to the COVID-19 pandemic, by every indication, Defendants were diligently attempting to Plaintiff's request under challenging circumstances." (*Contreras & Metelska, P.A. v. United States Department of Justice*, Civil Action No. 20-1261 (SRN/KMM), U.S. District Court for the District of Minnesota, Nov. 23)

In two companion opinions resolving a series of never-ending FOIA suits brought against the IRS by William Powell for tax records about his family printing business in Detroit, Judge James Boasberg has ruled that Powell is precluded by the doctrine of **issue preclusion** or because he failed to show that the agency did not **conduct an adequate search** for other requests. Issue preclusion occurs when the same issue is presented in litigation involving the same parties, the issue has been properly determined by a court, and the second case must not work a basic unfairness to the party bound by the first determination. Powell argued that he had brought one of the suits subject to issue preclusion to the IRS's Return and Income Verification Systems unit and that it was not brought under FOIA. However, Boasberg noted that "even if Powell had originally utilized

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the 'non-FOIA' RAIVS process to make his requests, his claims challenging the IRS's failure to fulfill those requests are correctly construed as causes of action under FOIA." Powell also claimed that the agency failed to conduct an adequate search for records concerning his grandfather's trust. Boasberg disagreed, noting that "as the Service reasonably explains, the existence of the Andrew Powell *Trust* BMF transcript, which was previously produced to the Plaintiff, does not indicate the existence of a Form 706, a different tax record, for Andrew Powell, a taxpayer different from the trust entity. Similarly, it is unclear – and Plaintiff does not offer any explanation – how an IMF transcript for Amelia Powel bears on Defendant's search for the Andrew Powell Form 706 at issue." (*William E. Powell v. Internal Revenue Service*, Civil Action No. 18-2675 (JEB) and *William E. Powell v. Internal Revenue Service*, Civil Action No. 18-2675 (JEB), U.S. District Court for the District of Columbia, Nov. 30)

A federal court in New York has become the third jurisdiction to reject Jack Jordan's determined attempts to force the government to disclose a privileged email from an attorney for DynCorp, which courts have consistently found was privileged under **Exemption 4 (confidential business information)** after it came into the possession of an administrative law judge at the Department of Labor during litigation stemming from a complaint filed by Jordan's wife Maria. Jordan first litigated the case through the D.C. Circuit and then moved to the Western District of Missouri, where he litigated through the Eighth Circuit. He then tuned to a third front – the Eastern District of New York – representing Sandra Immerso in her FOIA suit for the DynCorp email. Representing Immerso, Jordan fared no better than he had in other jurisdictions. The court noted that "because the court concludes that DOL has adequately established that the [DynCorp] email meets all criteria for withholding pursuant to FOIA Exemption 4, and because Plaintiff fails to establish that DOL is not entitled to a presumption of good faith, the court finds that DOL properly and legally withheld the [DynCorp] email." (*Sandra Immerso v. U.S. Department of Labor*, Civil Action No. 19-3777 (NGG) (VMS), U.S. District Court for the Eastern District of New York, Nov. 20)

Judge Rudolph Contreras has ruled that CREW and the Refugee and Immigrant Center for Education and Legal Services **failed to state a claim** in their joint suit brought against the Department of Homeland Security alleging the agency violated the **Federal Records Act** when it failed to document the separation of children at the southern border that would allow for reunification of separated families. CREW and RAICES filed suit alleging three violations of the FRA. Contreras dismissed those claims but allowed CREW and RAICES to amend its suit to state a claim for relief. In the amended complaint the organizations alleged, under the Administrative Procedure Act, that DHS's recordkeeping guidelines and directives violated several regulations implementing the FRA. Contreras initially found that RAICES had **standing** to bring the suit. The agency argued that RAICES alleged injuries were caused by poor recordkeeping by U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, but not by DHS's recordkeeping policies. However, Contreras noted that "just because CBP and ICE's downstream recordkeeping errors contribute to RAICE's injuries does not mean that DHS's upstream failure to promulgate FRA-complaint recordkeeping practices cannot do so as well. And the Court rejects any suggestion that DHS's adoption of such policies would not affect the practices of its component agencies." Contreras then found that the complaint satisfied the requirements of the APA. However, he concluded that the parties had not shown a plausible claim for relief. He pointed out that "DHS's policies require compliance with the FRA and all of its implementing regulations. They may be general in substance, but the FRA gives agencies latitude to craft records-creation policies appropriate for their circumstances. Given that DHS consists of twenty-two different component agencies, it is reasonable that the parent agency's umbrella policy would speak in broad terms while instructing components to develop FRA-compliant policies tailored to their own unique missions and structures." (*Citizens for Responsibility and Ethics in Washington, et al. v. U.S. Department of Homeland Security, et al.*, Civil Action No. 18-2473 (RC), U.S. District Court for the District of Columbia, Nov. 30)

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