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Washington Focus: The SEC has revised its requirements for showing that records are confidential for purposes of Exemption 4. Citing the recent Supreme Court decision, Food Marketing Institute v. Argus Leader Media, in which the Court abandoned the substantial competitive harm standard because it did not track the plain language of the exemption, the agency's revisions noted that it was adjusting "the exhibit filing requirements by removing the competitive harm requirement and replacing it with a standard that permits information to be redacted from material contracts if it is the type of information that the issuer both customarily and actually treats as private and confidential, and which is also not material."

Ninth Circuit Rules Tiahrt Rider No Longer Qualifies as Exemption 3 Statute

A split panel of the Ninth Circuit has ruled that the Tiahrt Rider, which prohibits the Bureau of Alcohol, Tobacco and Firearms from expending funds responding to requests for gun trace data and was last approved by Congress in the 2012 Consolidated Appropriations Act, cannot be used as an Exemption 3 statute because it does not cite to the Freedom of Information Act as required by the OPEN FOIA Act of 2009. The majority also ruled that requiring BATF to run a computer program to search for responsive records did not require the creation of a record but, rather constituted a search for electronic records as defined by the 1996 EFOIA amendments. Dissenting, Circuit Court Judge Patrick Bumatay rejected the majority's premise, arguing that it was wrong as a matter of law to require the 2012 Tiahrt Amendment to conform with an earlier statue to be effective and that, further, the majority erred in concluding that federal law required FOIA disclosures that Congress had expressly prohibited.

The case involved a request from the Center for Investigative Reporting asking for the total number of weapons traced back to former law enforcement ownership from 2006 to the present. BATF rejected the request, arguing that the Tiahrt Rider prohibited the agency from responding to requests

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for gun trace data. Since courts in the past had upheld the Tiahrt Rider's prohibition on the use of funding to respond to FOIA requests for gun trace data, finding that prohibition qualified as an Exemption 3 statute, CIR took the tact that some other plaintiffs had used successfully to attack the Tiahrt Rider by arguing that it did not currently qualify as an Exemption 3 statute because it did not refer specifically to the FOIA as required by the 2009 OPEN FOIA Act.

Writing for the majority, Circuit Court Judge Kim McLane Wardlaw agreed with CIR that the Tiahrt Rider's failure to mention the OPEN FOIA Act disqualified the Tiahrt Rider as an Exemption 3 statute. She pointed out that "we must first answer a preliminary question here: which Tiahrt Rider (or Tiahrt Riders) is the asserted 'statute of exemption'? After all, Congress passed Tiahrt Riders in five different years, and most of them reflect differing restrictions on ATF's disclosure from the Firearms Trace System database. Moreover, some of these Riders were passed before the enactment of the OPEN FOIA Act of 2009, while others were enacted after that Act. The timing matters because Riders passed before the OPEN FOIA Act could serve as statutes of exemption without citing to 5 U.S.C. § 552(b)(3), but those passed afterwards must expressly cite to that subsection to constitute statutes of exemption. Given all this, we must determine which Tiahrt Rider or Riders are currently operative law."

Wardlaw then answered the question. She noted that "we conclude that the 2012 Rider – which enacted the language of the 2010 Rider without any alteration – is the only operative Rider because the 2010 Rider impliedly repealed the 2005 and 2008 Riders in full. Having reached that conclusion and upon looking to the 2010 Rider, we conclude that it is not a statute of exemption for the simple reason that, though enacted after the OPEN FOIA Act of 2009, it made no reference to 5 U.S.C. § 552(b)(3)."

In concluding that the Tiahrt Rider remained in effect even though it did not mention the FOIA as required under the 2009 OPEN FOIA Act, the district court had relied specifically on *Abdeljabbar v. Bureau of Alcohol, Tobacco and Firearms*, 74. F. Supp. 3d 158 (D.D.C. 2014), in which a D.C. Circuit district court found that Congress intended to preserve the prohibitions even though it neglected to mention FOIA. But after reviewing the analysis in *Abdeljabbar*, Wardlaw found the district court there did "not contemplate the issue of repeal by comprehensive replacement. Rather, the *Abdeljabbar* court rested its holding that the 2005 and 2008 Riders remained in effect despite the passage of the 2010 and 2012 Riders solely on its conclusion that the statutes were not in 'irreconcilable conflict.'" She pointed out that "the enactment of the OPEN FOIA Act represented a clear break from Congress's past habit of creating statutes of exemption in the dead of night. That the 2010 Rider may have sufficed to exempt FTS data from disclosure before the OPEN FOIA Act is thus irrelevant."

Although Bumatay's dissent made much of apparent distinctions between ATF's obligation to publish reports and prohibitions against using funds to disclose gun trace data, Wardlaw indicated that since ATF was allowed to disclose aggregate statistical data under the Tiahrt Rider, CIR's request fit that definition. Wardlaw then rejected the agency's argument that running a computer program to search for the data elements requested by CIR would constitute creating a record. She noted that "in some ways, typing a query into a database is the modern day equivalent of physically searching through and locating data within documents in a filing cabinet. The subset of data selected is akin to a stack of redacted paper records."

Bumatay argued that the OPEN FOIA Act was prohibited by the principle of legislative entrenchment. He pointed out that "express-statement laws are a form of entrenchment: they require a later enacted law to expressly reference a prior law if it is to actually supersede that law. But express-statement laws cannot impose some sort of 'recitation requirement' on future congresses." Regardless of the validity of Bumatay's assertion, Wardlaw indicated that the issue was never raised until Bumatay himself raised it at oral argument

and that the agency never pursued it. (*Center for Investigative Reporting v. United States Department of Justice*, No. 18-17356, U.S. Court of Appeals for the Ninth Circuit, Dec. 3)

Court Issues Declaratory Judgment in Case Involving FBI FOIA Processing

Judge Randolph Moss has granted declaratory judgment in wrapping up the remaining issues in 2013 consolidated litigation against the FBI brought by researcher Ryan Shapiro, reporter Jeff Stein, and National Security Counselors for records concerning the agency's processing of FOIA requests. Although Moss ruled in the agency's favor on many of the remaining unresolved issues, he continued to side with the plaintiffs concerning the agency's attempts to withhold search slips created as part of the processing of FOIA requests.

After reviewing the holdings from his six previous opinions in the case, Moss began his discussion of the current disputes by sharply chastising the FBI for its failure to provide any substance in its statement of material facts. He pointed out that "the FBI's counter statement of material facts demonstrates so little care and is so devoid of evidentiary support that it is properly treated as a nullity. The Court is not persuaded that a computer glitch can be blamed for the FBI's failure. Over these months have now passed since the FBI filed its 'penultimate' draft of the counter statements, and the FBI has made no effort to supplement or correct its filing with a statement that complies with the requirements of Rule 56 or Local Civil Rule 7(b). It is apparent that the FBI is content to rest on its 'penultimate' draft, and that draft fails meaningfully to controvert any of the factual statements upon which Plaintiffs rely."

In a previous opinion, Moss questioned the agency's reliance on Exemption 7(E) (investigative methods and techniques) to withhold files from an investigation that had been closed for 25 years. Noting that justifying an Exemption 7(E) claim was a "low bar," Moss nonetheless found the FBI had failed here. He pointed out that "the Court is unpersuaded that a description of the FBI's general methodology is sufficient to carry its burden." He observed that "although the standard is not a demanding one, neither is it an invitation for an agency to rely on a boilerplate justification that contains no information about the specific withholdings at issue, even after a district court concludes that more is needed and repeatedly orders that the agency offer *some* case-specific justification."

Moss rejected what he interpreted as the FBI's return to a broad argument he had rejected long ago – that records related to the processing of FOIA requests were protected by the deliberative process privilege privilege. Here, he noted that "when the Court granted summary judgment to the FBI in [the fourth decision in the case] as to the deliberative process records responsive to [one plaintiff's] request, the Court's ruling covered only those records that were prepared as part of the FBI's preparation or response to litigation. But the FBI now argues that holding would also apply to run-of-the-mill FOIA processing records prepared in the usual course, so long as the FOIA request was subsequently the subject of litigation. Here, at least as to eight pages of the records, all that the FBI has shown is that these records related to the processing of a FOIA request that later became 'subject to litigation.' That is not enough to sustain an assertion of the deliberative process privilege."

Moss also granted the plaintiffs' motion for declaratory judgment. He pointed out that "given the FBI's previous omission in explaining the evolution of its policies, the presumption of regularity on the part of government officials is weaker than it might otherwise be. Indeed, in light of the frequent changes in the FBI's position throughout this litigation, the Court cannot be 'absolutely' certain that the FBI will not revert to its original categorical policy in the future." He indicated that "indeed, the FBI asserted its broader categorical policy in this case, and the Court rejected that policy. Plaintiffs are thus entitled to declaratory relief." But he

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declined to issue a permanent injunction. He noted that "here, a declaratory judgment should be sufficient to protect Plaintiffs from any recurrence of the FBI's broad categorical policy, and a permanent injunction is thus not warranted at this stage. If the FBI reverts to its former policy, however, Plaintiffs are free to return to this Court to seek a permanent injunction under appropriate circumstances and at an appropriate time." (*Ryan Noah Shapiro, et al. v. United States Department of Justice*, Civil Action No. 13-555 (RDM), U.S. District Court for the District of Columbia, Dec. 11)

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 Highland School District properly withheld the names of two school employees who had been placed on unpaid disciplinary leave under the personnel file exemption. Reporter Brian Rittmeyer, a reporter at the *Pittsburgh Tribune-Review*, learned of the two disciplinary actions and asked for their identities. Highland denied the request, arguing the identities were protected by the personnel file exemption. Rittmeyer complained to the Office of Open Records, which found that because Rittmeyer was only asking for the names of the employees, he was not requesting information from a personnel file. Highland then appealed OOR's decision to the trial court, which ruled in the school district's favor. Rittmeyer then appealed. At the appeals court, he argued that Section 1127 of the School Code superseded the Right to Know Law because, Rittmeyer claimed, the provision required a public body, in the context of the Sunshine Act's open meeting provisions, to identify an employee who had been disciplined. The appeals court disagreed, noting that "section 1127 plainly contains no provision relating to public access to records. Section 1127 implicates the right of an *employee* to receive adequate process and does not pertain to any right of the *public* to access information about that employee. Indeed, section 1127 contains no language whatsoever mandating public disclosure of the identity of the employee subject to the initiation of the disciplinary process." The appeals court added that "that is not to say, of course, that the identity of the employee subject to discipline must remain confidential in perpetuity. . .Accordingly, should the disciplinary process in this matter ultimately result in the demotion or discharge of the employees at issue, then records relating to that discipline will no longer be exempt from disclosure under the RTKL. However, no provision of either the School Code or the Sunshine Act mandates disclosure of the employees' identities prior to such 'final action.'" (*Highlands School District v. Brian Rittmeyer and Tribune-Review*. No. 163 C.D. 2020, Pennsylvania Commonwealth Court, Dec. 3)

A court of appeals has ruled that the Office of Attorney General properly responded to a request from prisoner Andy Buxton for records concerning communications pertaining to his 2013-2016 criminal investigation. The agency responded that some records were protected by the criminal investigation exemption and that other records did not exist. Buxton appealed the agency's decision, but the agency upheld its original action. The appeals court ruled in favor of the OAG as well. The appeals court noted that "Buxton's sole support for his argument that such records exist is his assertion that it is 'absurd' to think otherwise. This speculation is not sufficient to rebut the evidence presented by the RTKL Officer, which establishes that the emails and correspondence sought in Buxton's RTKL request do not exist." While Buxton did not contend that the criminal investigation records were potentially exempt, he argued that disclosure in this instance would cause no harm. But the appellate court pointed out that "it is clear from our jurisprudence, however, that the completion of the OAG's investigation does not affect whether the records related to that

investigation are exempt from access." (*Andy Buxton v. Office of Attorney General*, No. 253 C.D. 2020, Pennsylvania Commonwealth Court, Dec. 2)

The Federal Courts…

A federal court in New York has ruled that the Open Society Justice Initiative has shown that the government **officially acknowledged** the existence of an investigation into the death of journalist Jamil Khashoggi through public statements made by President Donald Trump and Vice President Mike Pence. Both former Secretary of Defense James Mattis and CIA Director Gina Haspel also revealed the existence of the investigation in congressional testimony. In response to FOIA requests from OSJI for records concerning the agency's conclusions as to whether the Saudi government was responsible for Khashoggi's murder, the CIA disclosed 217 pages from its press office while the Office of the Director of National Intelligence 48 documents from its press office. The agencies acknowledged that they could not invoke a *Glomar* response neither confirming nor denying the existence of records since the agencies' participation had been officially acknowledged. Instead, the agencies claimed the records were exempt under **Exemption 1 (national security)** and **Exemption 3 (other statutes)** and that a collective "no number, no list" response, which allows an agency to acknowledge that it possesses some documents, while arguing "that any description of those documents would effectively disclose validly exempt information," was appropriate. Judge Paul Engelmayer explained that *Wilson v. CIA*, 586 F.3d 171 (2nd Cir. 2009), the Second Circuit precedent on when a disclosure constituted an official acknowledgment, required that the material requested must be as specific as the material previously confirmed, that it matched the information disclosed, and that the record was made public through an official and documented disclosure. Engelmayer pointed out that "an official acknowledgement does not compel the disclosure of other classified information where the prior disclosure is merely similar to, or only partially overlaps with, the withheld information." OSJI argued that a "no number, no list" response was contrary to the concept of a *Vaughn* index that explained all of an agency's withholding claims. Engelmayer, however, disagreed. He noted that "the issue instead is whether, and to what degree, the agencies have made the showing necessary to justify their claim here that any further elaboration would reveal classified information protected by Exemption One." He observed that "except where an official acknowledgement has disclosed a record in a manner specific enough to waive the agency's right to invoke Exemption One, the exemption protects the records that OSJI seeks from compulsory revelation." But Engelmayer indicated that "as to two distinct records, OSJI's argument gains more traction. These are the tape of Khashoggi's killing and the CIA's report on the killing. OSJI argues that the agencies have specifically disclosed the existence and their possession of these items, barring the agencies from making a 'no number, no list' response." As to the tape of Khashoggi's killing, Engelmayer pointed out that statements made by Trump and Pence confirmed that the agencies had possession of the tape. He observed that "the Government does not coherently explain why the physical possession as between the intelligence agencies, once the possession of at least one has been acknowledged, could reveal undisclosed classified information." He added that "the above official disclosures acknowledging the possession of the tape capturing Khashoggi's killing by multiple intelligence agencies, including specifically the CIA, is as specific as, and matches the information sought by, OSJI's request for a *Vaughn* index as to that unique record. The agencies thus must produce a *Vaughn* index for that tape." As to the existence of the CIA report, Engelmayer pointed out that disclosures made by Trump and Haspel "supply an official acknowledgement that the CIA created a written product analyzing Khashoggi's killing. These public disclosure as to the CIA's written product satisfy the *Wilson* test, requiring the CIA to produce a *Vaughn* index stating the subject matter of the record(s) and the agency that produced it." However, Engelmayer rejected OSJI's contention that Trump's statement revealing that the CIA had not come to a conclusion as to the involvement by the Saudi Crown Prince in sanctioning the killing constituted an official acknowledgement as well. He pointed out that "beyond revealing that the report did not reach an ironclad

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conclusion in either direction as to the Prince's culpability, the President's halting and indistinct characterizations fall short of revealing the report's actual findings." (*Open Society Justice Initiative v. Central Intelligence Agency, et al.*, Civil Action No. 19-234 (PAE) and No. 19-1329 (PAE), U.S. District Court for the Southern District of New York, Dec. 8)

A federal court in California has ruled that the EPA may not require the Sierra Club to redact emails that identified two petroleum lobbyists who were scheduled to meet employees from the EPA for drinks and to watch a hockey game because the identities had been inadvertently disclosed and should have been withheld under **Exemption 6 (invasion of privacy)**. The identities had been disclosed in response to a larger request for communications more broadly. After deciding the lobbyists might be subjected to harassment if their identities were disclosed to the press, the EPA took the step of asking the court to order the Sierra Club to redact the identities. The Sierra Club argued that the public interest in disclosure outweighed any claimed privacy interest. Magistrate Judge Joseph Spero indicated that "it is not clear how the EPA reached its determination that press contacts would be an unwelcome intrusion tantamount to harassment. There is no indication that the EPA has contacted the lobbyists to determine whether they object to disclosure of their names and their business email addresses. . .There is nothing inherently scandalous about friends meeting for drinks to watch hockey. Even if contact by the media would be 'unwanted,' and assuming that such contact might occur, it is not clear why the government affairs professionals at issue would be unaccustomed to handling a press inquiry or incapable of declining comment if they so chose." Spero added that "any risk of 'doxxing' and coordinated harassment would be a more significant concern, but the EPA has presented no evidence of any potential for such an outcome beyond pure speculation. There is no indication that any of the other lobbyists whose names or email addresses the EPA intentionally left unredacted on work-related emails have been subject to harassment, that the subject matter of the emails at issue would cause stigma, or that the versions of them that EPA filed two months ago in the public docket of this case (with the lobbyists' names and email addresses redacted) have attracted public attention of any kind." The court pointed out that "where the EPA has offered no reason to believe that the particular individuals at issue in this case would face harassment if their names or email addresses were disclosed, the Court assigns relatively little weight to that potential harm." The court rejected the agency's claim that the inadvertent disclosure should allow them to claw back the disclosed identities. Instead, the court observed that "many mistakes by litigant have consequences." The court indicated that "the remedy the EPA seeks – requiring the Sierra Club to destroy the documents at issue – would not prevent disclosure of the information at issue, which appears to consist at most three names and email addresses. That information has already been disseminated to multiple people at the Sierra Club. Given the discrete and uncomplicated nature of the information at issue, it will presumably remain within those individuals' knowledge even if the documents are destroyed. . .The Court is not inclined to invoked its inherent authority for an order that will have no practical effect on the (relatively weak) privacy interests at issue, nor will the Court restrain the Sierra Club employees' speech in the absence of any showing that EPA could meet its heavy burden to obtain such an order, or even any clear request for the Court do so." (*Sierra Club v. United States Environmental Protection Agency*, Civil Action No. 20-03472-JCS, U.S. District Court for the Northern District of California, Dec. 8)

Judge James Boasberg has ruled that the Washington Post failed to show that it was entitled to **attorney's fees** for litigation brought by the newspaper to force the Department of State to disclose diplomatic cables warning of safety issues at a laboratory in Wuhan, China, where researchers studied novel coronaviruses. The *Post* filed a FOIA request for the cables and related records and asked for expedited processing. The agency denied its request for expedited processing and placed the request into the simple processing track "where it would be processed as quickly as possible." The *Post* filed suit challenging the denial of expedited processing and amending its complaint to include an allegation of failure to respond within

the statutory time limit. The State Department answered the suit two weeks later. The State Department suggested to Boasberg that he set a deadline of six weeks for a final response, which he adopted. The State Department provided its final response in five weeks, redacting some information under Exemption 5 (privileges) and Exemption 6 (invasion of privacy). The State Department also posted an earlier cable on its website, which it claimed was not responsive to the *Post*'s request because it was outside the date range of the request. The *Post* then told Boasberg it would no longer challenge the adequacy of the search. However, the *Post* then filed a motion for attorney's fees, arguing that its suit caused the agency to disclose the records. Boasberg disagreed. He noted that "here, the analysis begins and ends with eligibility – that is, whether the Post has 'substantially prevailed' in this suit." The *Post* argued that it was eligible for an award because Boasberg's scheduling order constituted a judicial order, making it the prevailing party. Boasberg rejected the claim, noting that "however, the Court here never ordered the government to produce responsive records by a date certain. Rather, it merely ordered State to issue a final response. . .Plaintiff cites no authority involving a routine scheduling order such as the one at issue here, which 'simply forwarded the litigation process.'" The *Post* also argued that its litigation caused the agency to disclose the records. Again, Boasberg disagreed. He pointed out that "aside from the sequence of events, there is no reason to think that State would have failed to release the April 2018 cable had the Post not filed its lawsuit." He added that "it seems more likely, in fact, that 'the documents would have been processed in the same manner,' with the same result, regardless of whether litigation was filed." He observed that "the Post's argument still boils down to nothing more than timing: State has not begun its work prior to the suit, then the suit was filed, and then State began the process that led to the cable's release. Concluding merely from those events that the lawsuit *caused* the cable's disclosure is *post hoc ergo propter hoc* reasoning, and in this context "causation requires more than correlation.'" Boasberg indicated that the *Post* was not arguing that its suit caused the agency to expedite the processing of its request. He pointed out that "the Circuit has not ruled on whether an agency's speedier release of records can qualify as a 'voluntary or unilateral change in position' sufficient to substantially prevail under the catalyst theory." (*WP Company LLC v. U.S. Department of State*, Civil Action No. 20-1082 (JEB), U.S. District Court for the District of Columbia, Dec. 9)

Resolving litigation brought by the National Day Laborers Organizing Network, the Asian Law Caucus, and the Immigration Clinic of the Benjamin Cardozo School of Law against the Department of Homeland Security for records concerning the since-discontinued program governing immigration enforcement known as the Priority Enforcement Program, a federal court in New York has ruled that most of the agency's **Exemption 5 (privileges)** claims were appropriate. After reviewing the records *in camera*, Judge Paul Engelmayer found the majority of the claims were appropriate, including establishing the **foreseeable harm** from disclosure. Some of the withheld documents dealt with efforts by the agency to explain the program and its actions, records for which the Second Circuit's privilege standard is less forgiving than the standard that has emerged from the D.C. Circuit. Explaining the Second Circuit's standard, Engelmayer noted that "where 'messaging communications,' such as talking points, 'amount to little more than deliberations over how to spin a prior decision, or merely reflect an effort to ensure that an agency's statement is consistent with a prior decision, protection would do little to advance the purposes underlying the [deliberative process] privilege.' However, where such 'communications are of a nature that they would reveal the deliberative process underlying a *not-yet-finalized* policy decision,' or a not-yet-announced policy decision, deliberations about what message to deliver, and how to go about doing so, can fall within the protections of the deliberative process privilege." In discussing an email pertaining to a blog post, Engelmayer noted that "the contested portions of the text of the email itself are properly withheld under the deliberative process privilege. The Court, however, finds that the draft blog post, which discusses past actions rather than future plans, is not protected under that privilege. Further, because the agency has not shown that there were changes later made to this draft, and thus that it is not the final language used, it is not properly

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withheld as a draft." (*National Day Laborer Organizing Network, et al. v. United Sates Immigration and Customs Enforcement, et al.*, Civil Action No. 16-387 (PAE), U.S. District Court for the Southern District of New York, Dec. 11)

A federal court in Virginia has ruled that the Council on Environmental Quality has failed to show the **foreseeable harm** in disclosing more than 5,000 pages withheld under **Exemption 5 (privileges)** in response to a FOIA request from the Southern Environmental Law Center for records concerning the agency's advance notice of proposed rulemaking for updating regulations for procedural provisions of the National Environmental Policy Act. CEQ produced 8,528 pages, 5,014 pages of which were fully redacted under the deliberative process privilege. Judge Glen Conrad ordered the agency to provide the records for *in camera* review. After reviewing the records *in camera*, Conrad found that they had failed to meet the heightened standard required in the 2016 FOIA Improvement Act. He noted that "CEQ has not adequately demonstrated it will suffer a reasonably foreseeable harm from the documents' unredacted production. To justify its redactions, CEQ cites a 'foreseeable harm of chilling speech and stifling frank and open discussions' and a general 'risk of public confusion.' However, the court's *in camera* review of the documents showed scant risk of either potential harm arising. Simply put, having studied each unredacted document, the court cannot conclude that 'disclosure would harm an interest protected by an exemption.'" As a result, Conrad ordered the agency "to produce fully-unredacted versions to SELC excluding personal contact information redacted pursuant to FOIA Exemption 6." (*Southern Environmental Law Center v. Council on Environmental Quality*, Civil Action No. 18-00113, U.S. District Court for the Western District of Virginia, Dec. 14)

A federal court in Washington has ruled that U.S. Customs and Border Protection must unredact portions of records it withheld under **Exemption 7(E) (investigative methods or techniques)** in response to a request from the Council on American-Islamic Relations-Washington. CAIR argued that Exemption 7(E) did not apply to instances revealing unlawful activity by the government. Judge Ricardo Martinez found that portions of redacted records showed such unlawful activity and ordered the agency to unredact those portions. Referring to one such instance, he pointed out that "this email explicitly discusses a change to procedures related to the vetting of United States citizens and U.S. legal permanent residents. Section 1 and subsection 1a must be unredacted. These do not discuss law enforcement techniques or information that could allow persons seeking to enter the United States to alter their patterns of conduct to avoid detection." Referring to another instance, Martinez noted that a portion of a paragraph must be unredacted "as they discuss the underlying unlawful activity and do not discuss law enforcement techniques or information that could allow persons seeking to enter the United States to alter their patterns of conduct to avoid detection." (*Council on American-Islamic Relations-Washington v. United States Customs and Border Protection, et al.*, Civil Action No. 20-217RSM, U.S. District Court for the Western District of Washington, Dec. 14)

On remand from the D.C. Circuit, Judge Beryl Howell has ruled that while the D.C. Circuit's conclusion that the currently sealed applications and resulting court orders filed by the DEA must eventually be processed for disclosure, the process will remain slow and cumbersome. BuzzFeed reporter Jason Leopold and the Reporters Committee for Freedom of the Press filed suit in U.S. district court in D.C., requesting an order to force the Department of Justice to process and disclose the sealed applications under the principle of access to court records. Howell agreed that the plaintiffs had a right to disclosure but limited the relief to more recent records after concluding that the administrative burden of processing the historical records would be too great. Leopold and the Reporters Committee appealed to the D.C. Circuit, which ruled that burden was not a cognizable factor in assessing disclosure issues pertaining to court records under *United States v. Hubbard*, 650 F. 2d 293 (D.C. Cir. 1980). Howell acknowledged the courts were ill-equipped to take on the

responsibility of processing and disclosing such a volume of records. She indicated that "the clear import of the Circuit's decision in *Leopold*, together with its nod to the district court's flexibility to manage the unsealing process, is that historical [court] materials are subject to redaction and unsealing – not merely to an extraction process, even if these petitioners would be satisfied with such a process. Upon unsealing, petitioners and any other interested members of the public or media may conduct their own searches of publicly accessible judicial records to identify any such records of interest." (*In the Matter of Application of Jason Leopold and BuzzFeed, Inc. for Access to Certain Sealed Court Records*, Misc. Action No. 20-95 (BAH), U.S. District Court for the District of Columbia, Dec. 10)

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