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Washington Focus: As part of spending bill passed in December 2019, the Department of Agriculture has begun to restore animal welfare records that had previously been removed from its websites. After USDA agencies began to remove personally identifying information about family-owned businesses, a number of animal rights groups brought suit. Last year, a coalition of animal rights groups led by the Animal Legal Defense Fund won a ruling in the Ninth Circuit recognizing a cause of action to enforce the affirmative disclosure requirements in section (a)(2) of FOIA, aimed particularly at restoring the deleted animal welfare records. Speaking about how the restoration project is proceeding, Cathy Liss, president of the Animal Welfare Institute, told the Washington Post that "we're making use of what's available now, and we're holding our breath and waiting to see what will come within 60 days and ultimately how they will seek to interpret the language" of the spending bill.

Draft Public Statements Covered by Deliberative Process Privilege

One area of the case law concerning the reach of the deliberative process privilege that has remained open to judicial interpretation has been whether drafts of public statements – such as the preparation of congressional testimony or press releases – qualify for protection since they inherently contain information that is intended ultimately to be made public. District court judges in the Second Circuit tend to view such materials as more explanatory in nature than deliberative and, as a result, have concluded that they are not privileged. But district courts in the D.C. Circuit have coalesced around the conclusion that there is no principled reason to differentiate such materials – regardless of whether the aim in producing them is to explain an issue to the public – if the materials bear the typical indicia of other types of records that qualify for the deliberative process privilege – they are both pre-decisional and deliberative.

In her recent decision ruling in a case brought by journalist Jason Leopold and researcher Ryan Shapiro for records from various intelligence agencies concerning how the agencies were publicly responding to inquiries about the investigation of Russian interference in the 2016 election. Judge Colleen

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Kollar-Kotelly made clear that materials dealing with the preparation of agencies' talking points qualified for the deliberative process privilege. After the agencies finished their searches and made their exemption claims, Leopold and Shapiro told Kollar-Kotelly that they planned to challenge only claims made under Exemption 5 (privileges) or Exemption 7(A) (interference with ongoing investigation or proceeding). That left three agencies that had claimed the deliberative process privilege to withhold records. The Office of the National Director of Intelligence withheld 29 documents in part and five documents in full, the CIA withheld 19 documents in full, and the State Department withheld three documents in full or in part.

Leopold and Shapiro argued that the deliberative process privilege did not apply to the withheld documents for two reasons. First, they contended that "the deliberative process privilege only applies to deliberations about substantive agency policy, not merely how to articulate the policy to outside entities." Secondly, they asserted that "even if public relations matters could potentially qualify under the deliberative process privilege, the defendants' affidavits are insufficient to establish entitlement to that privilege." Noting that Leopold and Shapiro provided no D.C. Circuit case law to support their claims, Kollar-Kotelly observed that "governmental decisions and policies can include the formulation of an agency's statements to the public and other entities. As such, the Court finds unduly restrictive Plaintiffs' arguments that the formulation of an agency's public statements cannot be deliberative."

Kollar-Kotelly pointed to several recent cases in which other district court judges in the D.C. Circuit had found that talking points qualified for protection under the deliberative process privilege, particularly *American Center for Law & Justice v. Dept of Justice*, 325 F. Supp.3d 162 (D.D.C. 2018) and *Judicial Watch v. Dept of State*, 306 F. Supp. 3d 97 (D.D.C. 2018). Leopold and Shapiro pointed instead to a series of older decisions from district court judges in the Southern District of New York, including *New York Times v. Dept of Defense*, 499 F. Supp. 2d 501 (S.D.N.Y. 2007) and *Fox News Network v. Dept of Treasury*, 739 F. Supp. 2d 515 (S.D.N.Y. 2010). But Kollar-Kotelly observed that the district court decisions from the Southern District of New York "appear to be implicitly undercut by the United States Court of Appeals for the Second Circuit's decision in *ACLU v. Dept of Justice*, 844 F.3d 126 (2d Cir. 2016). In that case, the Second Circuit concluded that 'a set of suggested talking points concerning the legal basis for drone strikes' and 'a draft proposed op-ed article that suggested some ways of explaining the Government's legal reasoning in support of drone strikes' were protected by the deliberative process privilege."

Embracing the other district court decisions from the D.C. Circuit and rejecting those from the Second Circuit, Kollar-Kotelly indicated that "as long as communications are pre-decisional and deliberative, internal agency communications about public statements can be protected by the deliberative process privilege. This conclusion complies with the purpose of the deliberative process privilege which is to encourage 'honest and frank communication within the agency' unhampered by fear of public disclosure. Agency decisions about how to present substantive policies to the public or to other outside entities often involve sensitive deliberations." But she explained that "in order to receive the protection of FOIA Exemption 5, through the deliberative process privilege, defendant agencies must still provide 'context about the particular press-related deliberations at issue and cannot rely solely on conclusory labels.'"

Kollar-Kotelly then applied the deliberative process privilege to the records withheld by the three agencies. ONDI had the largest number of documents withheld. Indicating that the ONDI records fell into five categories, she described them overall as "including information such as the date and general description of the documents as well as more detailed information which was provided in the agency Declaration." For one entry describing an email exchange to develop a response to press inquiries, Kollar-Kotelly noted that "the exchanges reveal back-and-forth communications between personnel at ODNI and other stakeholders. The emails were sent in an effort to revise any potential response to the media inquiries. And, in the attempt to develop an appropriate response, multiple stakeholders shared their opinions and their candid advice regarding

strategy for these two media inquiries. Disclosure of such information risks chilling government personnel from providing their true feedback on controversial issues. Additionally, disclosure risks causing public confusion as the communications may be materially different from the agency's actual, final response on these issues."

She found that both the CIA and the State Department had also articulated why their deliberative process privilege claims were appropriate. As to the CIA, she pointed out that "higher-level officials were not required to follow these recommendations." She added that "the recommendations did not represent final agency policy, and any potential responses were not intended to be presented as written" and that "the recommendations reflected in the document may have been further revised after the documents were crafted and prior to any public statements by higher-level officials." As to the State Department's withholding claims, Kollar-Kotelly observed that "the withheld information reflects which aspects of the subject matter in question lower-level subject matter experts found important or otherwise worthy of addressing. The talking points were subject to further revision and changes by senior officials prior to use. As such, they reflect the 'give-and-take consultative process' by which the State Department decides how to issue statements to outside entities." (*Jason Leopold, et al. v. Office of the Director of National Intelligence, et al.*, Civil Action No. 16-2517 (CKK), U.S. District Court for the District of Columbia, Feb. 18)

Views from the States

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

Louisiana

A court of appeals has ruled that the Board of Supervisors of Southern State University is subject is to the Open Meetings Law and that its grievance committee violated the OML when it terminated several faculty members without allowing the affected faculty members to attend the meeting. In response to the faculty members' suit, Southern argued that its grievance committee was not a public body for purposes of the OML. The trial court found that the grievance committee was a public body, invalidated all the terminations, and awarded the plaintiffs $8,400 in attorney's fees and $5,000 in statutory damages. Southern appealed the trial court's ruling. The court of appeals explained that to qualify as a public body, the grievance committee must be a "committee or subcommittee" of the Board of Supervisors. The appeals court found that to be the case here, noting that "although the individual members of the Grievance Committee were appointed by the President-Chancellor, the Grievance Committee was formed under the authority and direction of a public body. . ." Having found that the trial court did not err in concluding that the grievance committee violated the OML, the court of appeals also dismissed Southern's challenge to the trial court's fee award. The court of appeals also awarded the plaintiffs an additional $1,400 for their costs defending Southern's appeal. (*Elaine Lewnau, et al. v. Board of Supervisors of Southern State University*, No. 2019 CA 0943, Louisiana Court of Appeal, Jan. 9)

Michigan

A court of appeals has ruled that the Oakland Community College Board of Trustees violated the Open Meetings Act when it discussed the termination of an employee as part of a closed session. The Board went into closed session. After the closed session ended, the Board reconvened in open session and approved a proposed plan presented in the closed session, including the termination of Dr. Timothy Meyer, who had been

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chancellor of Oakland Community College. Meyer then filed suit for breach of contract and violation of the OMA. The trial court found that it did not have jurisdiction to hear Meyer's OMA claim pertaining to the Board's breach of contract. Meyer argued that his contract allowed him to bring an action for breach of contract within a year of such an allegation. However, the trial court pointed out that suits to enforce the OMA needed to be brought within 60 days of the alleged violation. The appeals court sided with the trial court on this issue, noting that "subject-matter jurisdiction pertains to a court's abstract power over a class of cases, regardless of the particular facts of the case." The appeals court observed that "a defense of lack of jurisdiction cannot be waived by a litigant, and 'subject-matter jurisdiction cannot be granted by implied or express stipulation of the litigants.'" The court of appeals indicated that "because the [trial court] was denied jurisdiction to hear or determine a claim to invalidate the Board's decision for violation of the OMA, the court properly dismissed plaintiff's claim for violation of the OMA to the extent that plaintiff sought invalidation of the Board's decision." Nevertheless, the court of appeals concluded that Meyer had stated a claim against the Board for injunctive relief for its actions taken as a result of the closed session. The appeals court pointed out that "we reverse the trial court's determination that plaintiff failed to state a claim for a violation of the OMA to the extent that plaintiff seeks statutory damages and remand for proceedings consistent with this opinion." (*Dr. Timothy Meyer v. Oakland Community College Board of Trustees*, No. 345738, Michigan Court of Appeals, Jan. 7)

New Jersey

A court of appeals has ruled that the Borough of Saddle River failed to show that the names of individuals participating in a hunt as part of a contract the Borough signed with the United Bowhunters of New Jersey to allow hunting on Borough properties to cull the deer population were protected by the privacy exemption in the Open Public Records Act. In response to an OPRA request from Doreen Frega for the names of approved hunters and the location of properties, the Borough refused to provide the names of hunters who volunteered to participate, claiming disclosure would lead to harassment. The trial court ruled against the Borough, finding that Saddle River had not shown that the privacy interests outweighed the public interest in knowing about how the hunt would be conducted. Saddle River than appealed the trial court's ruling. The appeals court upheld the trial court's ruling. The court of appeals noted that "defendants' argument that disclosure would cause participants to withdraw from the program is not supported by any evidence." The appeals court added that "a name and address is not generally recognized as confidential information. No promise of confidentiality was made by the Borough in its resolution to implement the cull nor its contract with the UBNJ. Thus, concerns about unauthorized disclosure are minimal." (*Doreen Frega v. Borough of Saddle River*, No. A-2252-18T3, New Jersey Superior Court, Appellate Division, Jan. 27)

Washington

A court of appeals has ruled that the City of Tacoma failed to show that the specific intelligence exemption in the Public Records Act protects the police department's use of cell site simulator technology provided by the FBI. Tacoma purchased the CSS technology from the FBI in 2013, entering into a non-disclosure agreement with the FBI which prevented the police from disclosing the existence of the CSS technology to the public. Arthur West submitted a PRA request to Tacoma in 2014 for records about the purchase, as well as records about the use of the technology by the police. West then submitted a second PRA request in 2015 for similar records. In response to West's 2015 request, Tacoma identified 74 pages of emails and grant update documents that had not been included in Tacoma's response to his 2014 request. West filed suit, arguing that Tacoma had failed to provide the responsive records that were located as part of his 2015 request. Because of the restrictions placed on disclosure of records pertaining to CSS technology by the FBI, Tacoma redacted information, claiming the specific intelligence exemption. The trial court ruled in favor of Tacoma on that issue, but found that the 74 pages of emails should have been disclosed in response to West's

2014 request and penalized Tacoma $10 a day for the 363 days during which it had improperly withheld the emails. The court of appeals found the specific intelligence exemption did not apply. Noting that "the City seeks to keep secret the methods by which it surveils *all* of its citizens," the court of appeals pointed out that "we do not believe the legislature intended the phrase '*specific* intelligence information' to apply to such a comprehensive method of surveillance." Addressing the issue of whether the emails were responsive to West's 2014 request, the appeals court indicated that the records "are a single thread of emails drafting responses to a reporter's written questions. These records should have been searched and disclosed because they relate to the City's policies, procedures, and understandings regarding CSS technology and what information the public can know." West argued that the trial court had erred in determining the penalty assessment. Because it reversed the trial court on the adequacy of the City's search, the court of appeals remanded the matter to the trial court for a new PRA penalty assessment. (*Arthur West v. City of Tacoma*, No. 51487-7-II, Washington Court of Appeals, Division 2, Jan. 28)

The Federal Courts…

Judge Amit Mehta has ruled that the EPA failed to show that it **conducted an adequate search** for records in response to 24 requests from the law firm of Husch Blackwell concerning communications between the agency and either the International Agency for Research on Cancer (IARC) or the California Office of Environmental Health Hazard Assessment (OEHHA) concluding that the herbicide glyphosate caused cancer. However, Mehta also found that the agency properly withheld records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Twelve requests each named a separate individual, six of whom were EPA employees, and asked for all electronic communications to or from the named individual containing specified search terms. The second 12 requests were identical except that they covered a more recent time frame. The agency suggested that two separate searches would pick up the same emails and suggested combining them into one search. Husch Blackwell agreed to the proposal and the agency ran one search but limited its search to the six identified EPA employees. The agency disclosed some records, but withheld others. Husch Blackwell challenged the search as well as the agency's exemption claims. Mehta agreed with Husch Blackwell that the search as run was inadequate. He explained that "to understand the inadequacy of the search, picture these requests and the search run as two concentric circles. The large, outside circle contains all communications between *any* EPA official and the six non-EPA individuals resulting from the applied search string. The smaller, inside circle contains all communications between a subset of EPA personnel – the six named EPA officials/custodians – and the six non-EPA individuals resulting from the applied search string. By running the search string across only the six identified EPA custodians, the agency's search captured the communications within the smaller, inside circle. But what the agency missed is the non-overlapping portion of the concentric circles; that is, by limiting the search to only six custodial files, the agency missed any communications between other agency personnel and the six non-EPA individuals that did not include the six custodians. The agency's search string would have captured such an email only if one of the six custodians was also a recipient; but if not, then the email would have eluded the search as crafted." Mehta pointed out that "this is not to say that the agency had to search the custodian files of all EPA personnel to find responsive records. That would be too great a burden. But the agency did have to undertake a reasonable effort to determine which EPA personnel other than the six custodians might have communicated with the six non-EPA persons and to search those additional custodial files. Optimally, the parties would have reached agreement on the universe of relevant custodians. In any event, by limiting the search to the files of only the six identified EPA officials, the agency fell short of its obligation to run searches that would 'be reasonably expected to produce the information requested.'" Turning to the agency's Exemption 5 claims, Husch Blackwell argued that records related to congressional testimony and public briefings reflected past

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agency decisions and were not, therefore, predecisional. Although Husch Blackwell pointed to case law in the Second Circuit supporting its position, Mehta noted that "the court need not, however, venture outside this District for answers. 'Courts in this jurisdiction have repeatedly concluded that talking points prepared for use in congressional testimony are deliberative and predecisional documents subject to FOIA exemption 5.' The same is true of talking points and deliberations about press inquiries or public statements by an agency." Mehta rejected the agency's attorney-client privilege claim, noting that "the agency does not, for instance, explain how the communication conveyed or sought *legal* advice about the ongoing litigation, particularly in the context of a press inquiry." The agency withheld information identifying third-party individuals in emails. Mehta agreed with the agency's claims, indicating that "releasing the individual's full email address would constitute an unwarranted invasion of privacy." (*Husch Blackwell, LLP v. United States Environmental Protection Agency*, Civil Action No. 18-01213 (APM), U.S. District Court for the District of Columbia, Feb. 12)

Judge Christopher Cooper has ruled that the Department of State properly withheld 130 documents in full and 11 in part under **Exemption 3 (other statutes)**, citing section 222(f) of the Immigration and Nationality Act, which allows the agency to withhold records pertaining to the issuance or refusal of visas, in response to requests from Yolanda Vizcarra Calderon and Ranfiel Castaneda Sanchez. Vizcarra Calderon and Castaneda Sanchez argued that "only the thought processes of those who ruled on actual visa applications may be exempted under the INA, as opposed to information (like quasi-refusals) that may be used to rule on a future application." Cooper, however, pointed out that "but the Court need not decide whether a document revealing that State has placed a quasi-refusal designation in a FOIA requester's file is always exempt under section 222(f). Here, State has satisfied its burden to show that all of the records at issue – save one – were used in processing or adjudicating actual visa applications, regardless of whether the records contain a quasi-refusal designation." He added that "even if information compiled for the purpose of informing visa decisions is not generally covered by section 222(f) until it is used to adjudicate an actual application—which the Court doubts – it is beyond dispute that such information is exempt when it has in fact been used by State in considering an actual visa application." Vizcarra Calderon and Castaneda Sanchez claimed that the other remaining document pertained to a visa revocation, which they argued was not covered by section 222(f). Cooper pointed out that there while Judge Emmet Sullivan had ruled in *Darnbrough v. Dept of State*, 924 F. Supp. 2d 213 (D.D.C. 2013) that visa revocations were not covered by section 222(f), Judge Randolph Moss, in *Soto v. Dept of State*, 2016 WL 3390667 (D.D.C., June 17, 2016), had ruled that revocations were covered by section 222(f). Cooper sided with Moss, noting that "section 222(f) is sufficiently broad to encompass revocations, even though 'issuance of a visa is undoubtedly a distinct act from the revocation of that same visa,' because 'the relevant question is not one of equivalence but of pertinence.'" (*Yolanda Vizcarra Calderon v. U.S. Department of Homeland Security, et al.*, Civil Action No. 18-764 (CRC) and *Ranfiel Castaneda Sanchez v. U.S. Department of Homeland Security, et al.*, Civil Action No. 18-765 (CRC), U.S. District Court for the District of Columbia, Feb. 18)

A federal court in California has **stayed** its order requiring to Department of Labor to disclose records concerning statistical data on contractors' EEO-1 employment diversity reports after finding that the reports do not contain commercial information for purposes of **Exemption 4 (confidential business information)** to allow Synopsys, Inc. to intervene to block disclosure of its report after the government indicated it would not appeal the decision. Expressing skepticism about Synopsys' claim that its interests had not been adequately represented by the agency, Magistrate Judge Kandis Westmore noted that "indeed, Synopsys furnished a supporting declaration in support of the Government's motion. That the Government and Synopsys believed that the motions would turn on whether the reports were 'confidential' within the meaning of Exemption 4, rather than on whether the information was 'commercial,' does not mean that there was a divergence in

interests at the time the cross-motions were decided." Granting Synopsys' motion to intervene, Westmore pointed out that "the court is inclined to deny the motion insofar as it seeks intervention to relitigate or reconsider matters decided in the December 10, 2019 order." (*Center for Investigative Reporting v. U.S. Department of Labor*, Civil Action No. 19-01843-KAW, U.S. District Court for the Northern District of California, Feb. 4)

Judge Tanya Chutkan has ruled that the Department of Veterans Affairs and the Department of Education properly withheld the remaining disputed documents from Celestino Almeda, a veteran of the guerilla fighting against the Japanese occupation of the Philippines during World War II, under **Exemption 5 (privileges)**. Chutkan also found that both agencies had shown that they had conducted a sufficient **segregability analysis**. The 1946 Rescission Act prevented Filipino veterans from accessing United States veterans' benefits, and Almeda had long advocated for proper recognition and compensation of Filipino veterans. He requested records from the VA and Education Department related to an interagency working group established to analyze barriers faced by Filipino veterans in obtaining compensation for their service. VA withheld 19 documents under Exemption 5, claiming the deliberative process privilege or the attorney-client privilege. Chutkan noted that "here, each of these contested Bates page ranges is predecisional and deliberative because each relates to the drafting process of a blog post." Almeda provided an email and attachment that, although withheld by the VA, had been previously obtained elsewhere by Almeda, to show that the contents were not deliberative. Disagreeing with Almeda's assessment, Chutkan indicated that "the email in question describes the timing of the publication, the drafting at a particular stage of the process, and the roles played by various members in the drafting process. The email and associated attachment are thus protected because they represent the 'contents of drafts' and 'the drafting process itself.'" Almeda also disputed VA's segregability determination based on the contents of the email and attachment that he had already obtained. But Chutkan pointed out that "because disclosure of the factual material could reveal deliberative judgments, the court finds that withholding this material does not violate the VA's obligation to disclose reasonably segregable material." VA also withheld the names of non-senior employees under **Exemption 6 (invasion of privacy)**. But Chutkan observed that "the court need not reach the issue of whether the names are properly withheld under Exemption 6 because it finds that they are properly withheld under Exemption 5." She cited *Brinton v. Dept of State*, 636 F.2d 600 (D.C. Cir. 1980), noting that "the D.C. Circuit has held that 'if agency records are indeed deliberative, it is appropriate to apply Exemption 5 to the documents themselves, as well as to the names of their authors.' Because the underlying documents are indeed deliberative, and because the redacted names are those of the authors of those deliberative documents, the court finds that the names were properly withheld." She also found that the Education Department had provided a sufficient justification for its Exemption 5 claims as well as its segregability analysis. (*Celestino G. Almeda v. United States Department of Education, et al.*, Civil Action No. 17-2641 (TSC), U.S. District Court for the District of Columbia, Feb. 7)

Judge Amy Berman Jackson has ruled that a coalition of public interest groups did not show that the Trump administration violated the **Presidential Records Act** and the **Federal Records Act** by failing to create, maintain, and properly dispose of records of interactions with foreign leaders. CREW, the National Security Archive, and the Society for Historians of American Foreign Relations brought suit asking for a writ of mandamus and injunctive relief. But Berman Jackson explained that "since the Court is bound by Circuit precedent to find that it lacks authority to oversee the President's day-to-day compliance of statutory provisions involved in this case, the motion to dismiss will be granted. Thus, this opinion will not address, and should not be interpreted to endorse, the challenged practices; nor does it include any finding that the Executive Office is in compliance with its obligations." Berman Jackson started her review with *Armstrong v.*

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Bush (Armstrong I), 924 F.2d 282 (D.C. Cir. 1991), in which the D.C. Circuit held that "the PRA precludes judicial review of the President's recordkeeping practices and decisions." But in its subsequent decision in *Armstrong v. Executive Office of the President (Armstrong II)*, 1 F.3d 1274 (D.C. Cir. 1993), the D.C. Circuit held that "the bar on judicial review shields only the 'creation, management, and disposal decisions' of the President and not 'the initial classification of existing materials.'" Berman Jackson fast-forwarded to 2019, explaining that in *CREW v. Trump*, 924 F.3d 602 (D.C. Cir., 2019), the D.C. Circuit had adhered to the principles laid out in the *Armstrong* decisions when dismissing a suit by CREW and the National Security Archive to force the Trump administration to stop using an app that allowed electronic messages to be automatically deleted after reading. Berman Jackson noted that in *CREW v. Trump*, the D.C. Circuit ruled that "it lacked jurisdiction to order the executive to take corrective action" and that "it could not police whether the White House was complying with its own policy." Berman Jackson also indicated that in *CREW v. Trump*, the D.C. Circuit observed that "a district court judge must steer clear of efforts to supervise day-to-day operations within the White House, even when a complaint presents legitimate concerns about an ongoing practice that threatens the preservation of, and public access to, presidential records." Berman Jackson found that the allegations made by CREW and the other plaintiffs concerning the Trump administration's failure to preserve exchanges with foreign leaders were not subject to judicial review. Berman Jackson pointed out that a second fatal flaw in the complaint was that "the law is clear that the Court cannot order the President to perform discretionary duties." She observed that "since the duties set forth the in these statues are not purely ministerial obligations imposed on the defendants, plaintiffs have not established the clear duty to act necessary to support the request for mandamus" and that she did not have "jurisdiction to issue the declaratory and injunctive relief that plaintiffs have requested." (*Citizens for Responsibility and Ethics in Washington, et al, v. Donald J. Trump*, Civil Action No. 19-1333 (ABJ), U.S. District Court for the District of Columbia, Feb. 10)

A federal court in New York has ruled that a 2017 directive issued by the EPA prohibiting scientists with EPA grants from serving on EPA advisory committees violates the Administrative Procedure Act because it is **arbitrary and capricious**. Although the U.S. Office of Government Ethics had issued regulations on handling conflict of interest issues, the basis for the revision rested on the EPA's conclusion that an EPA grantee was inherently conflicted and, as a result, such an individual was only eligible to serve on an advisory committee if they gave up any grants. The Natural Resources Defense Council filed suit, claiming the directive violated the fair and balanced requirements of the **Federal Advisory Committee Act**. The EPA moved to dismiss the suit, arguing that the fair and balanced standards in the FACA were too vague to be **justificable**. The EPA relied on two district decisions from other Circuits – *Physicians for Social Responsibility v. Wheeler*, 359 F. Supp. 3d 27 (D.D.C. 2019), and *Union of Concerned Scientists v. Wheeler*, 377 F. Supp. 3d 34 (D. Mass. 2019). But District Court Judge Denise Cote instead relied on her colleague Judge Allison Nathan's more recent decision in *Natural Resources Defense Council v. Dept of Interior*, 410 F. Supp. 3d 582 (S.D.N.Y. 2019), in which Nathan concluded that FACA did provide manageable standards for judicial review. Based on Nathan's ruling, Cote observed that "the EPA has therefore failed to overcome the strong presumption that Congress did not mean to prohibit all judicial review of the EPA's decision regarding the composition of advisory committees." Cote found the directive was arbitrary and capricious. She noted that "the EPA concedes, as it must, that the Directive is a departure from prior EPA policy that allowed EPA grant recipients to serve as members of advisory committees." She explained that "the EPA did not articulate why an outright ban on EPA grant recipients would improve the existing policies that required demanding and continuous conflict of interest reviews. . ." (*Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, Civil Action No. 19-5174 (DLC), U.S. District Court for the Southern District of New York, Feb. 10)

A federal court in California has ruled that attorney Michael Aguirre **failed to exhaust his administrative remedies** before bringing three separate FOIA suits against the Nuclear Regulatory Commission for not responding to his requests pertaining to an incident at a nuclear facility outside San Diego. In the first case, Aguirre made two requests for technical details about the misalignment incident. He also agreed to pay up to $1,500 in costs. The agency classified him as a commercial requester and told him that he would need to provide an advance payment before the agency would process the requests. In response to the agency's email, Aguirre's law partner Maria Severson sent a letter threatening to file suit unless the agency committed to expediting the requests. Although the agency claimed to have sent a letter acknowledging receipt of the appeal, District Court Judge Cynthia Bashant indicated that the letter was not in the court records. However, the agency emailed Aguirre asking him to clarify the request, which might have an effect on the determining fees. The agency subsequently told Aguirre that it was aggregating his two requests for fee purposes and that because it had not heard back regarding an advance payment, it was administratively closing the requests. Several weeks later, Aguirre filed suit. Citing *Oglesby v. Dept of Army*, 920 F.2d 56 (D.C. Cir. 1990), in which the D.C. Circuit ruled that a requester was required to appeal an agency's tardy response if the agency had actually responded before the requester filed suit, Bashant noted that *Oglesby* applied here. She pointed out that "by the time Plaintiff filed his suit, he had been in communication with the NRC for a few months." She observed that "it would have been easy and straightforward for Plaintiff to respond to the NRC, simply stating that he did not believe he was required to pay a fee to clarify his FOIA request. Instead, he turned to the court." Aguirre focused on the alleged misconduct of the agency in the underlying incident. But Bashant noted that 'this is irrelevant. The allegation of what the NRC is doing wrong (i.e., why Plaintiff requested documents through FOIA in the first place), is separate and apart from any evidence that Plaintiff should be permitted to evade administrative exhaustion." Bashant found the agency acted appropriately in requiring Aguirre to make an advance payment before it would process his request. She noted that "while it is true that Plaintiff agreed ahead of time to pay up to $1,500 in fees, that does not mean that the NRC was not within its rights to request Plaintiff follow up on this assertion and have him pay the $563.60 before it began working on Plaintiff's request." She added that "it is undisputed that Plaintiff did not pay the advance fee. He did not inform the NRC that he believed he was not required to pay that fee, nor did he request a fee waiver. Because he has not paid the required fee, he has not exhausted his administrative remedies." She found that Aguirre's failure to respond to the NRC's request for clarification of his other request meant he had failed to perfect his request. Bashant pointed out that "Plaintiff responding to the email rather than filing suit would have avoided unnecessary court intervention. His actions evade the purpose of administrative exhaustion and did not give the NRC a full opportunity to evaluate his request." (*Michael J. Aguirre v. U.S. Nuclear Regulatory Commission*, Civil Action No. 19-495-BAS-BLM, U.S. District Court for the Southern District of California, Feb. 19)

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Attorney Michael Aguirre submitted a FOIA request March 11, 2019 to the NRC for records related to communications from Southern California Edison pertaining to a webinar the NRC was hosting March 25, 2019 about a safety incident at a nuclear facility operated by SCE. Aguirre also asked the agency to provide the records by March 23. On March 21, an agency FOIA officer told Aguirre that because his request did not qualify for **expedited processing**, its estimated date of completion would be May 2, 2019. On March 28, the agency contacted Aguirre asking him if he was still interested in the material since the meeting had already taken place. Aguirre's law partner Marie Severson responded, indicating that she would like the records that day. The agency told Severson that since the records originated with SCE, it would take at least 30 days to review and process. Aguirre then filed suit. The agency then provided some responsive records that had been processed. While Aguirre admitted he filed suit early, he argued that filing an administrative appeal would be futile. District Court Judge Cynthia Bashant noted that "plaintiff's arguments are borderline ridiculous." She

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pointed out that "Plaintiff made an unreasonable request, and the NRC began to respond to its in a reasonable manner. Allowing a party to file suit before the agency has been allowed the statutory time limit to respond to the request completely ignores the purpose of administrative exhaustion." (*Michael J. Aguirre v. U.S. Nuclear Regulatory Commission*, Civil Action No. 19-587-BAS-BLM, U.S. District Court for the Southern District of California, Feb. 18)

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Attorney Michael Aguirre submitted a FOIA request to the NRC for records related t documents the agency referred to Southern California Edison, the operator of a nuclear facility near San Diego, about a safety violation at the facility. The agency told Aguirre that the records needed to be provided to SCE as part of the pre-notification disclosure process. Aguirre then filed suit. The agency argued that Aguirre **failed to exhaust his administrative remedies** because he did not file an administrative appeal. Aguirre argued that because the agency had engaged in "collusive behavior and evasive tactics," the court should not require exhaustion. District Court Judge Cynthia Bashant disagreed, noting that "this argument is illogical – how can Plaintiff contend that the NRC is evading his request when he barely gave it a chance to respond in the first place? The pointed of administrative exhaustion is to allow the NRC to review Plaintiff's case, respond to him, and form a record. If Plaintiff does not allow this to happen, he cannot seriously argue that the NRC is stonewalling him or not properly responding to his requests." (*Michael J. Aguirre v. U.S. Nuclear Regulatory Commission*, Civil Action No. 19-1102-BAS-BLM, U.S. District Court for the Southern District of California, Feb. 18)

A federal court in Missouri has ruled that Robert Campo's FOIA suit against the Department of Justice should be **stayed** until the Eighth Circuit rules in a case brought by attorney Jack Jordan to obtain two emails written by Darin Powers, an attorney for the company DynaCorp, which became part of an administrative law proceeding before the Department of Labor, and was previously withheld from Jordan because it was privileged under Exemption 4 (confidential business information) as part of litigation Jordan brought in the D.C. Circuit and the Eighth Circuit. Jordan's appeal to the Eighth Circuit is still pending. But since he brought that litigation, he has also represented Ferissa Talley in her lawsuit against Labor in the Western District of Missouri. Talley's suit has also been stayed pending the Eighth Circuit's ruling in Jordan's case. Now Robert Campo who is also represented by Jordan, sued the Justice Department for the same emails, arguing that DOJ had the emails because it represented Labor in its litigation against Jordan. DOJ asked the court to stay Campo's case until the Eighth Circuit ruled in Jordan's appeal. DOJ explained that "the FOIA request in this matter and one of the FOIA requests in the *Jordan* matter 'seek the same document.' As a result, the DOJ asserts it 'is substantially likely' that the Eighth Circuit's decision in the *Jordan* matter 'will assist in the resolution of. . .substantive issues in this case.'" Campo argued that DOJ had not shown why the fact that Campo and Jordan were seeking the same record was relevant. But the court pointed out that "at the same time, Campo does not show how this fact is irrelevant. . .Moreover, this argument does not harmonize with Campo's summary judgment arguments and Jordan's declaration, which is submitted in support of Campo's motion for summary judgement, both of which address, at length, Jordan's lawsuits seeking production of the emails." Approving the stay, the court indicated that "based on the filings in the *Jordan* matter, the *Talley* matter, and this matter, the parties will engage in duplicative motion practices if the matter is not stayed pending the Eighth Circuit's resolution of the *Jordan* matter. For the foregoing reasons, the Court finds a stay of this matter is both appropriate and necessary." (*Robert Campo v. U.S. Department of Justice*, Civil Action No. 19-00905-W-ODS, U.S. District Court for the Western District of Missouri, Feb. 11)

A federal court in Wisconsin has ruled that the Executive Office for U.S. Attorneys and the Bureau of Alcohol, Tobacco and Firearms **conducted adequate searches** for records responsive to requests from federal

prisoner Kevin O'Neill, a member of the Outlaws Motorcycle Club, who was convicted on racketeering charges in 2000, for records that might question his conviction. The Outlaws were investigated and prosecuted by a federal, state and local task force that included U.S. Assistant Attorney Paul Kanter, ATF Special Agent Sandra DeValkenaere, and Milwaukee Police Detective Roger Hinterthuer. O'Neill also claimed the Outlaws were investigated by another law enforcement group called the Midwest Cycle Intelligence Organization, which included, among others, Kanter, DeValkenaere, and Hinterthuer. Hinterthuer published a memoir in 2015 in which he claimed that he, Kanter, and DeValkanaere fabricated grand jury testimony. Based on Hinterthuer's memoir, O'Neill submitted FOIA requests to both EOUSA and ATF for the fabricated grand jury testimony. Both agencies conducted searches but found no records. O'Neill then filed suit. O'Neill argued that the agencies should have searched the MCIO files. The court rejected that claim, noting that "FOIA requests to EOUSA and ATF cannot reach documents in the possession and control of the MCIO at the time of the requests. Nor can requests to EOUSA and ATF reach documents in the possession and control of MCIO members who are not EOUSA and ATF employees, such as Hinterhuer, regardless of who initially created the documents." (*Kevin O'Neill v. United States Department of Justice*, Civil Action No. 18-396-jdp, U.S. District Court for the Western District of Wisconsin, Feb. 25)

Judge Collen Kollar-Kotelly has ruled that a **Privacy Act** suit filed by Paul Morinville and Gilbert Hyatt, two inventors whose patent applications likely were set aside because of the Sensitive Application Warning System, a program operated by the Patent and Trademark Office from 1994 to 2014 that flagged patent applications for a variety of reasons, including the possibility of publicity or objectionable or derogatory subject matter. Morinville and Hyatt also alleged that applications could be flagged based on the identity of the applicant, which included collecting personal information about the applicant. Because applicants were unaware of the SAWS flagging process, they were unable to challenge the agency's decisions. Morinville and Hyatt's complaint alleged three violations of the Privacy Act – failure to maintain accurate records as required by subsection (e)(5), collecting and maintaining information about their First Amendment activities under subsection (e)(7), and failure to collect information directly from them, under subsection (e)2). Morinville and Hyatt also asked for relief under the Declaratory Judgment Act. PTO asked Kollar-Kotelly to dismiss the complaint, arguing that both Morinville and Hyatt had failed state a claim for relief. PTO argued that the files were not about the individuals but about the proposed invention. Noting that "it may become apparent that Defendant is correct," Kollar-Kotelly nonetheless indicated that "Plaintiffs have alleged that the SAWS material includes information about the individual patent applicants, not only about the proposed inventions. As such, drawing all reasonable inferences in Plaintiffs' favor, the failure to include the SAWS material in the patent application file would result in a failure to maintain a record concerning an individual." PTO also argued that Morinville and Hyatt had not shown actual harm. But Kollar-Kotelly noted that "at the motion to dismiss stage, the Court accepts as true Plaintiffs' allegation that a SAWS flag constituted a constructive denial of a patent application. Assuming the patent application met the statutory requirements of patentability, the withholding of a deserved patent constitutes an adverse determination." Kollar-Kotelly observed that "Plaintiffs have alleged that an adverse determination, a constructive denial of their patent applications, have already occurred. And, Plaintiffs' allegations have causally connected that harm to the omission of the SAWS material from their patent applications." Although the agency urged her to dismiss the Declaratory Judgment Act claim as well, Kollar-Kotelly allowed it to continue. She pointed out that "however, at the motion to dismiss stage, the Court is not prepared to say that Plaintiffs' Declaratory Judgment Act claim is duplicative of their Privacy Act claims or otherwise unnecessary or inappropriate." She allowed the plaintiffs' (e)(7) claim to continue as well. She indicated that "as with many of Defendant's arguments for dismissal, the Court's resolution of this argument requires additional development of the record. Plaintiffs have alleged that Defendant violate the Privacy Act by maintaining SAWS material describing patent applicants' exercise of their First Amendment rights. . .Whether or not Plaintiffs will be able to present evidence in support of their

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allegations is yet to be seen." However, Kollar-Kotelly found that Morinville and Hyatt had not connected the agency's use of Internet searches to collect information about them with any adverse determination. She pointed out that "Plaintiffs seem to ignore the requirement for a connection between the method of information collection and the adverse effect." Dismissing the (e)(2) claim, she indicated that "Plaintiffs have not alleged that Defendant's method of collecting SAWS information through internet searches had an adverse effect on Plaintiffs. Instead, Plaintiffs have alleged that the maintenance of the SAWS flags and reports caused Plaintiffs' patent applications not to be granted. More is required for relief for a claim under § 552a(e)(2)." (*Paul Morinville, et al. v. United States Patent and Trademark Office*, Civil Action No. 19-1779 (CKK), U.S. District Court for the District of Columbia, Feb. 26)