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Washington Focus: The Supreme Court Feb. 24 granted the government's certiorari petition to review another FOIA case, Fish and Wildlife Service v. Sierra Club. The case stems from a 2018 Ninth Circuit decision in which the appeals court ruled that decisions made by the Fish and Wildlife Service and the National Marine Fisheries Service finding under the Endangered Species Act that proposed changes in how the EPA regulated power plant cooling water intake structures would not adversely affect fish constituted a final decision by FWS and NMFS and were not protected by the deliberative process privilege.

Court Accepts Agency Foreseeable Harm Explanations

In 2018, Judge Amit Mehta was the first D.C. Circuit district court judge to find that an agency's obligation under the 2016 FOIA Improvement Act, codifying the foreseeable harm standard so that it applied to all the exemptions, required more of agencies than to merely recite the elements of the applicable exemption. Instead, after examining the legislative history of the 2016 amendments, he concluded that, while agencies did not have provide complex explanations for every exemption claim, they did have to provide more detail articulating the reason for claiming the applicable exemption to satisfy their burden on summary judgment. Other district court judges in the D.C. Circuit – Emmet Sullivan, Colleen Kollar-Kotelly, and Beryl Howell – have since reached similar conclusions. Now, however, Mehta has been the first district court judge to review and accept an agency's detailed foreseeable harm exemption claims.

Both of Mehta's decisions involved FOIA litigation brought by *Miami Herald* reporter Carol Rosenberg for emails from former Marine Corps General John Kelly when he was head of U.S. Southern Command and in charge of Joint Task Force Guantanamo, to Lisa Monaco, who was then Assistant to President Obama for Homeland Security and Counterterrorism. In response to Rosenberg's request the Defense Department located 256 emails and 92 attachments totaling 548 pages, disclosing them with redactions or withholdings made under

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Exemption 1 (national security), Exemption 3 (other statutes), Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(E) (investigative methods or techniques). He accepted the agency's claims made pursuant to Exemption 3, Exemption 6, and Exemption 7(E), but found that the agency had not adequately justified its Exemption 1 and Exemption 5 claims.

In his 2018 opinion, Mehta had agreed with Rosenberg that one figure concerning a tally of hunger strikers and tube-fed detainees reported on the *Miami Herald* website derived from a public statement by Army Lt. Col. Samuel House, an Army spokesperson at Guantanamo and thus constituted an official acknowledgment. But he had also indicated that Rosenberg had failed to provide evidence that other figures on the website were based on official disclosures. Rosenberg had asked for reconsideration on this point, and after providing proof that all the website figures tallying hunger strikes and forced feedings at Guantanamo were based on official acknowledgements, Mehta ruled in her favor. He observed that "Carol Rosenberg's new declaration confirms, and DOD does not dispute, that 'every single data point in [the database] was obtained directly from an official in the Department of Defense who was authorized to disclose publicly the number of hunger strikers and forced feedings.'"

Mehta found "this additional information constitutes a 'change in the court's awareness of the circumstances,' which 'might reasonably be expected to alter the conclusion reached by the court.' The flexible threshold for interlocutory reconsideration is therefore satisfied. DOD would have the court deny reconsideration because Plaintiffs have not identified any 'new evidence' that was not previously available to it, but the court fails to see how 'justice requires' such a result.' In their earlier briefing, Plaintiffs clearly intended to demonstrate that all of these records had been officially disclosed, and now they have provided evidence demonstrating as much. Furthermore, denying reconsideration would seem particularly unjust given that the court has given DOD the opportunity to supplement the record with information that was likewise available to the agency during the previous round of briefing." DOD argued that Rosenberg had not shown that the information on the *Miami Herald* website was a match to the undisclosed figures. But Mehta pointed out that "the court already found that DOD must disclose 'the number of hunger strikers and forced-fed detainees for the date of May 15, 2013,' because the official disclosure of those tallies was as specific as, and matched the information Plaintiffs sought. The same is true of DOD's official disclosures as to all other tallies in this timeframe."

In his earlier opinion, Mehta found that DOD had not shown that email exchanges in which Kelly expressed his opinion on the effect of a military commission's decision that female guards could not touch certain detainees were truly deliberative. Further, he found that DOD did not provide enough detail to meet its burden of proof on the issue of the foreseeable harm from disclosure for its Exemption 5 claims. He allowed DOD to supplement its affidavits and this time around found that the agency's explanations regarding both concerns were appropriate. As to whether Kelly's comments about the commission's ruling were deliberative, Mehta indicated that the agency's affidavit "confirms that General Kelly was not just 'opining or reflecting' on the ruling. Rather, his opinions were part of a broader deliberative process in which he was 'considering various options in relation to the military commission's temporary order.'" Mehta pointed out that "General Kelly's decisions about the merits of the ruling – understood in their broader context as part of the agency's deliberations – are therefore subject to the deliberative process privilege."

Mehta explained that in his previous opinion he had concluded that "the degree of detail necessary to substantiate a claim of foreseeable harm is context-specific. In some instances, the withheld information may be so obviously sensitive – such as the disclosure of internal deliberations between a high-ranking military commander and senior government officials about a new detention operation in the United States – that a simple statement illustrating why the privilege applies and identifying the harm likely to result from release 'may be enough.' In other instances – such as where the withheld deliberations involve more mundane,

quotidian matters or the decisions have already been made – more explanation may be necessary." The agency had provided a supplemental affidavit explaining its Exemption 5 claims which, Mehta noted, had been divided into eight categories focusing on aspects of detainee operations. Mehta found the agency's detailed explanation more than sufficient except for a category entitled "facilities management," where Mehta found the agency had failed to provide an adequate explanation.

Rosenberg argued that the categories often included overlapping issues that did not seem sufficiently related to each other. But Mehta noted that "all this shows, however, is that the withheld records often involve multiple, overlapping categories of information. An agency taking a categorical approach does indeed have an obligation to 'group together *like* records,' so that the court can be sure that the records in that category all present similar risks of harm to an exemption-protected interest, but there is no reason a record cannot fall into multiple categories." Rosenberg also challenged whether disclosure of these discussions would cause foreseeable harm since they may have taken place years ago. Mehta rejected that claim as well, noting that "plaintiff loses sight of the fact that these are communications among the highest levels of leadership at DOD and the White House about highly sensitive operation issues at Guantanamo. Given the sensitivity of this information, the court can readily see how its release would prospectively harm agency decisionmaking, not withstanding the fact that the records are more than six years old." (*Carol Rosenberg, et al. v. U.S. Department of Defense*, Civil Action No. 17-00437 (APM), U.S. District Court for the District of Columbia, Mar. 5)

Views from the States

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

California

In the first appellate ruling on a 2018 amendment providing for disclosure of records pertaining to shootings by law enforcement officers that result in death or bodily harm, as well as substantiated findings of sexual assault or dishonesty on the part of a law enforcement officer, a court of appeals has ruled that the amendment encompasses all records related to such incidents and is not limited only to records of the agency that employs a law enforcement officer. However, the appeals court also pointed out that there is no legal reason why the catch-all exemption in the California Public Records Act, allowing agencies to withhold records when they can show that the public interest in non-disclosure outweighs the public interest in disclosure, is not applicable to such records. In early 2019, the First Amendment Coalition and KQED submitted broad requests for records concerning police shootings to the Office of the Attorney General. The Attorney General refused to provide any records for shootings involving officers other than those who worked for the Department of Justice and argued that records involving officers from other jurisdictions were maintained by those agencies and needed to be requested from them. The First Amendment Coalition and KQED filed suit. The trial court ruled that DOJ was required to provide records for all agencies subject to applicable redactions. The trial court did not address the issue of whether the catch-all exception applied to the officer shooting records. The Department of Justice appealed the trial court's ruling. The appellate court upheld the trial court's decision, noting that the language of the amendment "makes clear that officer-related records in the Department's possession are subject to disclosure, regardless whether such records concern peace officers employed by the Department or by another state of local agency and no matter which agency created them." The court of appeals found that the catch-all exemption could apply to these records. The

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appeals court noted that "because the CPRA catchall exemption contemplates a variety of competing interests including privacy, public safety, and public fiscal and administrative concerns, it may apply more broadly than the withholding provision in the [amendment],which is limited to active investigations." (*Xavier Becerra v. Superior Court of the City and County of San Francisco*, No. A157998, California Court of Appeal, First District, Division 3, Jan. 29)

A court of appeals has ruled that although the City of Lafayette violated the disclosure provisions of the Ralph Brown Act requiring open meetings, the violation did not require nullification of the City's decision to grant a permit to build a tennis cabana on a neighbor's property over the protests of Lori Fowler and a group of neighbors. The neighbors' attorney threatened to sue the city if the permit was not approved. To discuss the threat of litigation, the city council held four closed sessions, which were included in the city's database of notations but otherwise not made public. The City granted the permit at an open meeting and Fowler and other neighbors filed suit, alleging among other claims, that the city council had violated the Brown Act. The trial court ruled in favor of the City and Fowler and the others appealed. The appeals court found that the City had violated the disclosure requirements of the Brown Act. The City argued that it had made the notations in its database pertaining to the closed meetings available to anyone who wanted to view them. But the appeals court pointed out that was insufficient. The appeals court noted that "members of the public are entitled to rely on the agenda and packet made available upon request and the City has drawn our attention to no authority suggesting an interested citizen must, in addition, go to the planning counter, speak to the planner, and ask the planner to pull up the Notes field of an application file. . .to determine whether the legislative body has received a litigation threat that might properly be the basis of a closed session." Although it found that the City had violated the Brown Act, the court of appeals rejected Fowler's request to nullify the City's action granting the permit. The appeals court noted that "Plaintiffs' complaint is that they were not informed that [the neighbors' attorney] had threatened litigation before the City Council discussed the threat in closed session. But the action they seek to nullify is the approval of the cabana, which occurred not in a closed session, but in an open session that was properly noticed and at which the City Council considered the matter fully after hearing from all interested parties." (*Lori Fowler, et al. v. City of Lafayette*, No. A156525, California Court of Appeal, First District, Division 4, Feb. 10)

Louisiana

A court of appeals has ruled that although the New Orleans City Council's Utility, Cable, Telecommunications and Technology Committee violated the Open Meetings Law when it held a meeting that allowed supporters of Entergy to speak publicly in support of the company's construction of the New Orleans Power Station in East New Orleans, while excluding others from attending the meeting because of limited space. The committee recommended the construction by a 4-1 vote, which was then referred to the city council. Two weeks later, the city council met. That meeting also had a large attendance but anyone who wanted to speak publicly was eventually allowed to do so. The city council then approved the construction by a 6-1 vote. The Deep South Center for Environmental Justice and several other environmental and social justice advocacy organizations, filed suit, alleging violations of the Open Meetings Law. The trial court ruled that the committee meeting violated the OML, but that the city council meeting did not. However, because the trial court found that the committee meeting was a necessary component of the eventual decision, it nullified the city council's decision. Entergy then appealed. The appellate court largely upheld the trial court but concluded that the decision should not have nullified. The appeals court pointed out that "the record reflects that members of the public were deprived of the opportunity to observe the meeting and provide comments during the public comment period" while "individuals whom Entergy paid to attend the meeting and show support for NOPS did not have to leave the meeting room once they made comments. . .The purpose of the Open Meetings Law is to allow members of the public to observe the meetings of their governing bodies and voice their opinions in the decision-making process, and this purpose was not served at the Committee

meeting." The appeals court agreed with the trial court that those problems were not present at the city council meeting. Rejecting nullification, the appeals court explained that the committee's recommendations were not binding on the city council. The appeals court pointed out that "the Council is free to accept, modify, or reject any or all of the Committee's recommendations. Therefore, the trial court erred in determining that the Committee meeting was a 'necessary component' of the Resolution's passage, and that violations at the Committee meeting could render the Resolution voidable. Because it is only the Council's decision which ultimately has binding effect, and no violations occurred at the Council's meeting, no remedy is necessary where no violation occurred." (*Deep South Center for Environmental Justice, et al. v. Council of the City of New Orleans, et al.*, No. 2019-CA-0774 and No. 2019-CA-0775, Louisiana Court of Appeal, Fourth Circuit, Feb. 12)

New Mexico

A court of appeals has ruled that the New Mexico Department of Game and Fish improperly withheld names and email addresses of individuals who had applied for hunting licenses in 2015 and 2016, contending that they were not public records because they did not relate to public business. In response to an Inspection of Public Records Act request submitted by Aubrey Dunn, NMDGF agreed to produce only the applicants' names, arguing that non-disclosure would protect applicants from potential harassment by anti-hunting groups. The trial court ruled that policy ran contrary to the disclosure requirements of the IPRA and ordered the agency to disclose the email addresses. The NMDGF then filed an appeal. The appeals court upheld the trial court's ruling. The appeals court pointed out that "if the Legislature intended to limit the materials subject to disclosure as the NMDGF suggests, then the Legislature could have qualified 'public business' in a manner that used language requiring the materials to relate to a public body's substantive decisions, rather than material that is kept for purely administrative purposes." The appeals court indicated that "the Legislature did not, however, include email addresses or generally reference personal information kept for administrative purposes among the precisely defined 'protected personal identifier information.'" The appeals court observed that "the email addresses NMDGF collected in connection with its licensing system constitute 'public records' that are subject to disclosure under IPRA in the absence of an applicable exception." The appeals court noted that "NMDGF does not contend that there is an applicable exception. . .and we too cannot identify one." (*Aubrey L. Dunn v. New Mexico Department of Game and Fish*, No. A-1-CA-37577, New Mexico Court of Appeals, Jan. 31)

The Federal Courts…

Judge Reggie Walton has ruled that because of questions he has about Attorney General William Barr's credibility in describing the findings of the Mueller Report, he will conduct an ***in camera*** **review** of the unredacted report to determine if the Department of Justice's exemption claims are appropriate. Ruling in a consolidated case brought by EPIC and BuzzFeed reporter Jason Leopold for unredacted copies of the Mueller Report, Walton indicated that "the Court has grave concerns about the objectivity of the process that preceded the public release of the redacted version of the Mueller Report and its impact on the Department's subsequent justifications that its redactions of the Mueller Report are authorized by the FOIA." He pointed out that "the speed by which Attorney General Barr released to the public the summary of Special Counsel Mueller's principal conclusions, coupled with the facts that Attorney General Barr failed to provide a thorough representation of the findings set forth in the Mueller Report causes the Court to question whether Attorney General Barr's intent was to create a one-side narrative about the Mueller Report – a narrative that is clearly in some respects substantively at odds with the redacted version of the Mueller Report." Walton noted that

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"Attorney General Barr's lack of candor specifically, calls into question Attorney General Barr's credibility, and in turn, the Department's representation that '*all* of the information redacted from the version of the Mueller Report released by Attorney General Barr' is protected by its claimed FOIA exemptions. In the Court's view, Attorney General Barr's representation that the Mueller Report would be 'subject only to [appropriate] redactions. . .cannot be credited without the Court's independent verification in light of Attorney General Barr's conduct and misleading public statements about the findings in the Mueller Report and it would be disingenuous for the Court to conclude that the redactions of the Mueller Report pursuant to the FOIA are not tainted by Attorney General Barr's actions and representations." He questioned whether the redactions "are self-serving and were made to support, or at the very least to not undermine, Attorney General Barr's public statements and whether the Department engaged in post-hoc rationalization to justify Attorney General Barr's positions." Walton concluded that "the actions of Attorney Genera Barr and his representations about the Mueller Report preclude the Court's acceptance of the validity of the Department's redactions without its independent verification." (*Electronic Privacy Information Center v. United States Department of Justice*, Civil Action No. 19-810 (RBW) and *Jason Leopold & BuzzFeed, Inc. v. United States Department of Justice, et al.*, Civil Acton No. 19-957 (RBW), U.S. District Court for the District of Columbia, Mar. 5)

Judge Royce Lamberth has ruled that Judicial Watch may **depose** former Secretary of State Hillary Clinton concerning her understanding of her FOIA obligations and whether she intentionally tried to evade them by using a private server for her email while she was at State. Lamberth noted that 'although discovery is rare, the Court again reminds the government that it was State's mishandling of this case – which was either the result of bureaucratic incompetence or motivated by bad faith – that opened discovery in the first place." Addressing Judicial Watch's current request to depose Clinton, as well as her former chief of staff Cheryl Mills, Lamberth emphasized how important discovery had been already. He pointed out that "with each passing round of discovery, the Court is left with more questions than answers. What's more, during the December 19, 2019, status conference, Judicial Watch disclosed that the FBI recently produced approximately thirty previously undisclosed Clinton emails. State failed to fully explain the new emails' origins when the Court directly questioned where they came from. Furthermore, State has not represented to the Court that the private emails of State's former employees who corresponded with Secretary Clinton have been searched for additional Clinton emails." Judicial Watch asked to depose Brett Gittleson, who was director of the Executive Secretariat's Information Resources Management in 2013 and 2014 and had spoken with an attorney in the Office of the Legal Advisor about Clinton's email use, and Yvette Jacks, who was deputy director of that office from 2010 to 2015 and worked on troubleshooting of Clinton's private server during that time. Lamberth allowed Judicial Watch to depose both Gittleson and Jacks "within the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery." Lamberth also approved Judicial Watch's request to subpoena Google for records associated with Clinton's emails during her tenure at State. He pointed out that "the Court is not confident that State currently possesses every Clinton email recovered by the FBI; even years after the FBI investigation, the slow trickle of new emails has yet to be explained. For this reason, the Court believes the subpoena would be worthwhile and may even uncover additional previously undisclosed emails." Judicial Watch had already deposed Mills in 2016 as part of litigation before Judge Emmet Sullivan. Nevertheless, Lamberth allowed Judicial Watch to depose Mills again, within the appropriate parameters. He pointed out that "State's mishandling of this case opened up discovery in the first place, and Judicial Watch should not be prohibited from asking Ms. Mills about what it learned from discovery just because she was deposed over three years ago in Judicial Watch's case before Judge Sullivan." Clinton argued that she had already testified in public a number of times about the email server. But Lamberth indicated that "Judicial Watch also requests permission to question Secretary Clinton in greater detail about her understanding of State's records management obligations – including questions about her various training and briefings regarding these obligations. Judicial Watch correctly pointed out that many

questions regarding her understanding of these obligations still remain unanswered." Lamberth indicated that he also wanted to know more about Clinton's conduct. He wondered "how could Secretary Clinton possibly believe that everyone at State knew about her private server if her subordinates took pains to ensure that her email address would not be widely disseminated?" Approving Judicial Watch's request to depose Clinton, Lambeth indicated that "Judicial Watch will be permitted to clarify and further explore Secretary Clinton's answers in person and immediately after she gives them. The Court agrees with Judicial Watch – it is time to hear directly from Secretary Clinton." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 14-1242, U.S. District Court for the District of Columbia, Mar. 2)

In a ruling that closely paralleled his previous decision in a case brought by White Coat Waste Project against the Department of Veterans Affairs for identifying information about researchers at Louis Stokes VA Center in Cleveland using dogs, Judge Emmet Sullivan has ruled that the names of similar researchers at Hunter Holmes McGuire VA Center in Richmond are not protected by either **Exemption 5 (privileges)** or **Exemption 6 (invasion of privacy)**, but that a protocol containing proprietary information is protected by **Exemption 3 (other statutes)**. White Coat Waste Project submitted a FOIA request for records concerning the research at McGuire. Before the VA responded, White Coat Waste Project also submitted a request to the NIH for records concerning whether five VA facilities, including McGuire, failed to comply with the Animal Welfare Act. NIH provided documents showing that Dr. Alex Tan, the principal researcher at McGuire had shown reckless behavior during the dog experiments. The VA withheld identifying information about the researchers at McGuire, citing both Exemption 5 and Exemption 6. It also withheld ACORP # 02235, a protocol, under the Federal Technology Transfer Act. Sullivan started by pointing out that this case closely resembled his earlier decision in *White Coat Waste Project v. Dept of Veterans Affairs (WCW I)*, 404 F. Supp. 3d 87 (D.D.C. 2019), where he was faced with essentially the same types of records and exemption claims. The agency's Exemption 5 claim focused on the potential harassment of researchers, which could result in a lack of candor. But Sullivan noted that "the names of the principal investigators are neither pre-decisional nor deliberative." Pointing out that the names of the researchers were available on both the VA and NIH websites, he observed that "the VA fails to demonstrate that disclosure of the names of the principal investigators 'would be likely to "stifle honest, and frank communication within the agency."'" He added that "the VA fails to provide sufficient justification to withhold the names of the principal investigators pursuant to Exemption 5's deliberative process privilege." While Exemption 6 seemed liked a more natural fit, Sullivan found the names did not qualify for protection under that exemption either. He agreed with the agency that the names constituted "similar files" for purposes of Exemption 6. But to demonstrate the privacy interests in the investigators' records, the VA submitted an affidavit from Dr. Michael Fallon, Chief Veterinary Officer. WCW argued that Fallon's affidavit did not qualify under Federal Rule of Civil Procedure 56 because it was not based on personal knowledge. Sullivan agreed, noting that "Dr. Fallon fails to establish the basis for any personal knowledge of the incidents at McGuire VAMC and Milwaukee VAMC, as well as the incidents involving the researchers with no connections to the VA." By contrast, Sullivan noted that the public interest in disclosure was clear. He observed that "information about the experiments and the principal investigators' compliance and non-compliance with the animal research protocols and applicable federal regulations clearly fall under the ambit of information that 'let's citizens know "what their government is up to."'" Sullivan then found that the Federal Technology Transfer Act qualified as an Exemption 3 statute and protected the claimed protocol. He rejected WCW's claim that the agency had waived the claim because it did not bring it up until its reply brief. But Sullivan indicated that "the VA did not waive any arguments based on the FTTA because WCW had an opportunity to respond to the VA's arguments in its reply brief." (*White Coat Waste Project v.* United States Department of Veterans Affairs, Civil Action No. 17-1155 (EGS), U.S. District Court for the District of Columbia, Mar. 10)

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Judge Colleen Kollar-Kotelly has decided to conduct an ***in camera*** **review** of a memorandum memorializing a conversation between President Donald Trump and Michael Rogers, the former director of the National Security Agency, to determine if the memo is protected by the **presidential communications privilege**. The Protect Democracy Project submitted a FOIA request to the NSA for the memo, known as the Ledgett Memorandum after the former Deputy Director of the NSA who drafted the memo. The agency issued a *Glomar* response neither confirming nor denying the existence of records. However, after the memo was identified in the Mueller Report, the agency agreed to process the request. The agency claimed the memo was protected by **Exemption 5 (privileges)**. The Project argued that the disclosure of the memo's contents in the Mueller Report served as an official acknowledgement and waived the privilege. Explaining her decision to order an *in camera* review, Kollar-Kotelly noted that "the Court must evaluate not only whether the Ledgett Memorandum qualifies for the presidential communications privilege, but also whether the contents of the memorandum satisfy the disclosure/acknowledgment criteria. Complicating this evaluation is the fact that, in general, the presidential communications privilege extends to documents in their entirety. In this case, however, the Project appears to suggest that is not the case, or should not be the case, when some of the contents have been officially acknowledged or disclosed." She pointed out that "in light of [these] arguments and legal principles, making a responsible de novo determination of NSA's exemption claims requires in camera review." Although the NSA had submitted two affidavits, Kollar-Kotelly found neither of them provided sufficient justification for the claimed exemption. NSA argued that *in camera* review was not appropriate. Kollar-Kotelly indicated that although *in camera* review was frowned upon, particularly in situations dealing with national security issues, the affidavits that the agency submitted "are too broad and vague to determine whether the [memo] , or portions of it, were properly withheld." She pointed out that "the Court must consider whether the relevant information in the Ledgett Memorandum has been officially acknowledged, which requires close comparison of the relevant information disclosed in the Mueller Report and the relevant information contained in the Ledgett Memorandum. The affidavits do not provide detail on the latter for the Court to make a responsible de novo determination. Revealing enough of those contents via additional affidavits filed on the public docket to facilitate the determination may not be possible and is also problematic for the same reasons that NSA argues the memorandum should be withheld." (*The Protect Democracy Project v. U.S. National Security Agency*, Civil Action No. 17-1000 (CKK), U.S. District Court for the District of Columbia, Mar. 6)

Judge Amit Mehta has ruled that the Department of Justice properly withheld the remaining 21 pages of materials concerning Foreign Intelligence Surveillance Act applications pertaining to Carter Page under **Exemption 1 (national security)**, rejecting the claim by the James Madison Project that a White House press release explaining that President Donald Trump had ordered the declassification of pages 10-12 and 17-34 of the Page applications applied to the remaining pages as well. JMP and *USA Today* reporter Brad Heath requested FISA applications concerning the Trump Organization, President Trump, Trump's campaign, or people associated with Trump. DOJ disclosed 412 heavily redacted pages. However, two months after the agency's disclosure, Trump ordered pages 10-12 and 17-34 of the Page application declassified. JMP and Heath argued that the White House press release "reflected a presidential order to declassify the referenced pages in full." DOJ responded that "there had been 'no presidential declassification, and the President has publicly indicated that he is not requiring declassification at this time, much less full disclosure.'" DOJ also contended that "the Press Release is 'indisputably a statement from the press secretary, not an order from the President.'" In an earlier opinion in this case, Mehta has indicated that it was unclear whether the White House press release constituted a declassification order and told the agency to provide a more thorough explanation. This time, Mehta found the agency's explanation sufficient, noting that "after reviewing the [agency's declaration], the court is satisfied that Defendant has met its burden of establishing that the Press Release from September 17, 2018 did not constitute or reflect a presidential order to declassify the Pages.

Accordingly, the Pages were properly withheld pursuant to Exemption 1." JMP and Heath argued that there was no indication that the order had been rescinded or postponed. Mehta pointed out that "this argument misses the point. . .[T]he court never held that the Press Release was a declassification order or its equivalent. To the country, the court observed that the Press Release's text 'suggests' it might be or 'would appear' to be a declassification order or reflect one, but ultimately found the Press Release and the events that followed to be ambiguous." Mehta expressed irritation with JMP and Heath's suggestion that there was more to dispose of in the suit than the disputed 21 pages. Instead, Mehta emphasized that "there is not. Plaintiffs had every opportunity to oppose and cross-move as to any and all issues raised in Defendant's original motion for summary judgment, or as to any other issues they raised. They chose instead to contest only one discrete issue. Plaintiffs cannot now revive what they long ago abandoned." (*James Madison Project, et al. v United States Department of Justice*, Civil Action No. 17-00597 (APM), U.S. District Court for the District of Columbia, Mar. 3)

The D.C. Circuit has ruled that the Bureau of Prisons has not shown why it cannot edit video surveillance footage of an incident that took place in the dining room of Gilmer Federal Correctional Institution in which an inmate was attacked with a screwdriver and that if the agency is not more forthcoming on remand, the case might require a **trial**. Michael Evans, an inmate at Gilmer who had been attacked in 2013 in the Gilmer FCI dining room with a screwdriver, sued the United States under the Federal Tort Claims Act. To bolster his case, Evans submitted a FOIA request asking for records about similar incidents, including copies of the video footage of his 2013 attack. Evans' FOIA request also asked for records about tools that had been shipped to Gilmer in the past decade. The agency told Evans that to process such a request would cost $14,320. As a result, Evans narrowed his request for records about where the screwdriver that was used in his attack came from, as well as the video footage. BOP withheld the video footage under **Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods and techniques)**, and **Exemption 7(F) (harm to any person)**. As to the screwdriver, BOP indicated that since no Gilmer officials recognized the screwdriver or knew where it originated, no search was conducted. Evans filed an administrative appeal, which was upheld by the Office of Information Policy. Evans then filed suit. The district court ruled that Evans was asking the agency to answer questions. As to the video footage, the district court agreed with the agency that it did not have the capability to edit the footage to provide **segregable** images. Writing for the D.C. Circuit, Senior Circuit Court Judge David Sentelle explained that "Evans's reformulated request fundamentally altered his initial request." Instead of asking for records about invoices and shipments, the new request asked the agency to identify the specific screwdriver. Sentelle pointed out that "in light of the Bureau's affidavit stating that FCI Gilmer officials did not recognize the screwdriver reference, it was necessarily unable to produce responsive records." Sentelle was puzzled by "the vagueness of the government's claim of inability to segregate unprotected data." He pointed out that "we live in an era in which teenagers regularly send each other screenshots from all sorts of video media. Presumably, most of these teenagers have fewer resources than the United States government. It is not at all clear why the government could not at least isolate some screenshots that would meet the same sort of segregability standards typically applied to printed material." Sending the case back to the district court, Sentelle suggested that *in camera* review might be an appropriate tool. He indicated that "indeed, as the present record is not sufficient to support summary judgment, such an examination by the court may be necessary should this case result in a rare FOIA trial. That is, in such a trial, the district court would need to make findings of fact as to the exemptions, and it is difficult to see how this could be done without more than what the Bureau has offered in the affidavit." (*Michael S. Evans v. Federal Bureau of Prisons*, No. 18-5068, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 10)

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Judge Royce Lamberth has ruled that the FCC properly withheld an attachment prepared by Windstream Communications because it contained proprietary information for purposes of **Exemption 4 (confidential business information)**. Russell Lukas requested records that had been submitted to the Universal Service Administrative Company by Windstream Communications. USAC had denied universal service functions to three healthcare providers in rural Texas that had selected Windstream as their telecommunications service provider and Lukas asked for Windstream's written appeal of that denial. The FCC's Wireline Competition Bureau provided located a 52-page responsive document and disclosed 45 pages. After Lukas filed an administrative appeal, the agency provided more documents. Ultimately, the only unresolved issue was redactions made by Windstream in Exhibit E of Windstream's appeal. Lukas filed suit to force the agency to disclose those redactions. Lukas argued that the FCC had claimed Exemption 4 even before Windstream had asserted its commercial sensitivity. Lamberth found there was nothing wrong with the agency's process here. He pointed out that "although Windstream's assertion of commercial sensitivity is helpful to the FCC's decision to redact Exhibit E, it was not necessary in order for the Court to uphold the redactions, as FOIA allows the agency to make its own determinations regarding what information should be withheld or redacted under any of FOIA's nine exemptions. Furthermore, just because the agency initially based the redactions in Exhibit E on other exemptions does not make its ultimate decision regarding Exemption 4 improper, nor does it demonstrate bad faith. Agencies are (and should be) permitted to change their minds as they process FOIA requests – if the FCC had not been permitted to alter its decisions throughout this process, Mr. Lukas would not have received the documents that were initially withheld pursuant to the agency's original decision in September of 2017." (*Russell D. Lukas v. Federal Communications Commission*, Civil Action No. 19-465-RCL, U.S. District Court for the District of Columbia, Mar. 5)

A federal court in Connecticut has ruled that the Department of Defense has not shown that it is entitled to reconsideration of the court's previous ruling finding that the agency failed to show that names and email addresses of lower-level Air Force employees were protected by **Exemption 6 (invasion of privacy)**. District Court Vanessa Bryant originally rejected the agency's Exemption 6 claims after finding that the names and email addresses did not constitute "similar files" and thus did not qualify for Exemption 6 at all. Apparently taken by surprise, the agency argued that because it had not expected to have to show that the names and addresses were similar files, it had not briefed the issue, putting it at a disadvantage. Bryant rejected the notion out of hand. She noted that "in deciding a case a court is not constrained by the parties legal and factual analysis. Defendants cite no authority for the proposition that a defendant who fails to address or adequately address an element of a claim on which it seeks summary judgment is entitled to notice and an opportunity to file additional briefing." She explained that "[the requesters] prevailed on the issue of whether the STA professional biographies were 'similar files.' Having decided that threshold question with respect to the STA biographies in favor of [the requesters], the Court proceeded onto the 'more challenging question [of] whether the DOD's blanket redaction of names of DOD employees at the rank of Colonel and below. . . is justified under Exemption 6.'" She indicated that "after examining Second Circuit law, the Court concluded that the records at issue were not 'similar files' as they 'include no information identifiable to any individual other than names and contact information.' Although Defendants bore the burden of establishing the applicability of the exemption, the Court noted that 'Defendants made no argument as to why each of those documents qualifies as a "similar record" other than the fact that each contains identifying information of individual employees – e.g., names and email addresses.'" (*Protect Our Defenders and Connecticut Veterans Legal Center v. Department of Defense and Department of Homeland Security*, Civil Action No. 17-0063 (VLB), U.S. District Court for the District of Connecticut, Feb. 28)

Judge Amy Berman Jackson has ruled that the Urban Air Initiative is entitled to **attorney's fees** for its FOIA litigation against the EPA but has greatly reduced its nearly $190,000 fee request to a total of $75,400. The Urban Air Initiative, an organization promoting the benefit of ethanol fuels, made a FOIA request to the EPA for records concerning MOVES2014, an emissions model used by the EPA to measure the effects of individual fuel properties on emissions from vehicles. The data collection was mandated by the Energy Policy Act of 2005. UAI disagreed with the EPA's finding that ethanol use increased air pollution, and along with the States of Kansas and Nebraska, filed suit in the D.C. Circuit, claiming the model was faulty. UAI then submitted a FOIA request for records concerning the EPAct study. The EPA told UAI that there were 83,000 potentially responsive records at an estimated cost of $24,000. UAI subsequently agreed to limit the search to 36,000 potentially responsive records and agreed to pay $18,000 in costs. Four months after UAI filed suit, the EPA proposed a production schedule for records. UAI disagreed with the agency's proposal and a month later Berman Jackson issued a production schedule ordering the agency to provide non-exempt records in four weekly disclosures. Pursuant to that order, the agency disclosed more than 4,000 records. The agency eventually produced several thousand more records. The parties stipulated to a dismissal in February 2019. UAI then filed a motion for attorney's fees in May 2019. Berman Jackson agreed that UAI had substantially prevailed by securing a court order. The EPA characterized these orders as no more than procedural, but Berman Jackson disagreed, pointing out that "as part of its ruling, the Court ordered defendants to conduct a more thorough search, provide more detailed justification for the adequacy of its searches, and release any reasonably non-exempt records consistent with FOIA. As a result of this order, defendant submitted a status report indicating that it was in the process of reviewing records from the revised search, and it proposed a schedule to release those records. . .Though defendant characterizes this ruling as 'marginal,' it substantially altered the state of the relationship between the parties, and it resulted in the production of an additional 1,140 records – a number equal to a quarter of the total number of records produced." Having found that UAI had substantially prevailed, Berman Jackson examined whether it was entitled to a fee award. The EPA argued that UAI had not shown any public interest in the disclosure of records that would become public anyway. But Berman Jackson pointed out that "plaintiffs' request did not focus on the published results of the study; rather it sought information not available to the public. . .Plaintiffs sought to uncover errors or 'influence' in the study's design, and such information would be of interest to the multiple stakeholders involved in and affected by matters of national environmental policy and public health." Because UAI was connected to ICM, an ethanol plant construction company, EPA argued that its motivation for making the request was commercial. While Berman Jackson acknowledged UAI's ties to the ethanol industry, she noted that "significantly, defendant does not argue that plaintiff UAI, a nonprofit organization, was seeking to benefit *itself* commercially, but it suggest that the goal of the FOIA action was to benefit ICM commercially, which in turn would allegedly benefit UAI. But UAI's ambit and public advocacy extends beyond its relationship with ICM. In submitting the FOIA request, it advanced several public and policy-oriented goals, and once UAI received the documents, it made the requested information available to the public." EPA also argued that UAI's separate court challenge to the emission data provided a commercial motive as well. Calling this a closer question, Berman Jackson explained that case law finding that related litigation was a commercial factor was based on the likelihood of a fee award in the separate litigation. She indicated that was not the case here, but observed that "because plaintiffs made it clear that they requested the documents to aid their judicial challenge, the Court finds that these factors do weigh in some small measure against plaintiffs, and all of these circumstances will bear on the Court's discretion in fashioning an award." She found the agency's behavior was not reasonable. She noted that "while defendant did not ignore plaintiffs, and its behavior cannot fairly be described as 'recalcitrant' or 'obdurate,' it was not especially responsive either." After finding that hourly rates should be calculated using the USAO Matrix, Berman Jackson reduced UAI's fee award dramatically, awarding $65,000 for the litigation itself, and $10,000 for the litigation related to the fee award. (*Urban Air Initiative, Inc, et al. v. Environmental Protection Agency*, Civil Action No. 15-1333(ABJ), U.S. District Court for the District of Columbia, Feb. 27)

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Judge Rudolph Contreras has ruled that the Department of State properly issued a *Glomar* response neither confirming nor denying the existence of records in response to Robert Bales' FOIA request for information about visas that were issued for seven Afghani witnesses who testified at his court-marital for the 2012 murder of 16 Afghani citizens when Bales was stationed in Afghanistan with the U.S. Army. Bales' court-martial was held in the state of Washington in 2013 and included the seven Afghani witnesses. In September 2018, Bales requested information about visas issued to the witnesses as well as biometric data associated with the visas. State issued a *Glomar* response, claiming the existence of records was protected by **Exemption 3 (other statutes)** and **Exemption 6 (invasion of privacy)**. Bales argued that the agency's claim was not truly a *Glomar* response because the agency implicitly admitted that records existed. Contreras disagreed, noting instead that "the Plaintiff does not point to any language in which the Department's declarant directly acknowledges the existence of records, and, to the extent that Plaintiff is relying on inferential reasoning, he does not explain his logic." Contreras found the agency's Exemption 6 claim supported its *Glomar* response. Bales argued that the agency was being disingenuous by suggesting it was trying to protect the privacy of the seven witnesses. But Contreras pointed out that "the Department's motives are not part of the FOIA analysis, so even if the Plaintiff is correct that the Department is not genuinely interested in protecting the Afghan witnesses' privacy, it would not matter. Exemption 6 is implicated because disclosing whether the records exist would disclose information 'applying to' each Afghan witness." Contreras also rejected Bales' argument that he had identified a public interest in disclosure of the records. Contreras pointed out that "because the public interest in exoneration of the wrongfully-convicted would not be advanced if the Department were to disclose whether it had visa records pertaining to the Afghan witnesses, the Afghan witnesses' privacy interest in information pertaining to their immigration status and activities outweighs any public interest in disclosure." (*Robert Bales v. United States Department of State*, Civil Action No. 18-2779 (RC), U.S. District Court for the District of Columbia, Mar. 6)

Judge Emmet Sullivan has ruled that the Department of State **conducted an adequate search** for records about Roger Day, who alleged that he was tortured while held in Mexican federal prisons while awaiting extradition to the United States in 2010. The State Department searched for records in the Office of the Legal Advisor, the U.S. Embassy in Mexico City, and the Office of Overseas Citizens Services. The searches located 54 documents. The State Department released 17 documents in full, 29 in part, and withheld eight in full, claiming **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Day's only challenge to the agency's search was that it should have searched for records related to Belize in 2007. But Sullivan indicated that "no reasonable interpretation of FOIA Case Control Number P-2013-1467, which pertained to plaintiff and the events occurring in Mexico between 2008 and 2011, would have called for a search of records about Belize in 2007. An agency 'need not expand its searches beyond "the four corners of the request."' The State Department does not run afoul of FOIA by failing to search for or produce records other than those related to his August 9, 2013 request." The agency withheld records under the deliberative process privilege, the attorney work product privilege, and the attorney-client privilege. Sullivan approved all the agency's withholdings under Exemption 5. As to the attorney work-product privilege claim, he pointed out that "the State Department withholds from the memoranda regarding plaintiff's extradition materials 'prepared by or at the direction of. . . attorneys' reflecting the 'attorneys' mental impressions and legal strategies in connection with ongoing litigation.'" To claim Exemption 7, the State Department noted that "the Law Enforcement and Intelligence Office's 'mission. . .includes handling extradition matters and supporting law enforcement proceedings involving foreign governments.' In plaintiff's case, it appears that State Department officials were working with attorneys and officials at the U.S. Department of Justice to effect plaintiff's extradition and arrest. These qualify as law enforcement activities, and based on the declaration, certain of the responsive

records were compiled for law enforcement purposes." Approving the agency's Exemption 7(C) withholdings, Sullivan indicated that "the State Department's declarant adequately explains the law enforcement purpose of each document, describes the harm which could reasonably result from disclosure of third-party information, and avers that no public interest outweighs the third parties' privacy interests." (*Roger Charles Day, Jr. v. U.S. Department of State*, Civil Action No. 17-1418 (EGS), U.S. District Court for the District of Columbia,
Mar. 6)

A federal magistrate judge in California has ruled that U.S. Citizenship and Immigration Services properly claimed **Exemption 7 (C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods and techniques)** to withhold records from the A-File of Omar Abdulsattar Ameen, the subject of an extradition proceeding by the government, in response to a request from KXTV. After the agency refused to disclose any records, KXTV filed suit. Ameen then intervened and agreed to waive his privacy rights for certain documents. However, he subsequently changed his mind and instead provided 187 pages from his A-File directly to KXTV. He also waived his privacy interest in the remaining documents. The agency continued to withhold 26 partially redacted pages and three documents in full, claiming **Exemption 7 (A) (interference with ongoing investigation or proceeding)** as well as Exemption 7(C) and Exemption 7(E). The magistrate judge found the records met the threshold for Exemption 7 coverage, pointing out that "Ameen's A-File was put together by these law enforcement agencies and A-Files have routinely been found to 'meet [the Exemption 7] test because they are 'compiled for adjudicative and enforcement purposes' within DHS's statutory authority." The magistrate judge found the agency's explanation of its Exemption 7(A) clam was not sufficient, noting that "the names of the documents, without much more, do not give the Court any insight as to why the release of these types of investigatory records would interfere with the ongoing case. That their disclosure would reveal law enforcement techniques and the status of specific actions being taken is vague and veers into the territory of 'boilerplate or conclusory statements.'" Turning to Exemption 7(C), the magistrate judge observed that the agency had withheld personally identifying information about third parties and explained that "some of these individuals are private citizens. Others are government employees involved in Ameen's case. Investigatory records generated by law enforcement agencies often contain information about private citizens whose link to the official inquiry is tenuous." KXTV argued that there was a public interest in disclosure. But the magistrate judge indicated that "plaintiff is only able to point to allegations against Ameen from the Government's extradition memorandum as evidence that Defendant acted negligently or improperly in executing its duties. The Court declines to treat mere allegations against Ameen as clear evidence of governmental misconduct." KXTV argued that Exemption 7(E) did not apply because the techniques were publicly known. But the magistrate judge pointed out that "as long as the manner and circumstances of the techniques are not generally known, or the disclosure of additional details could reduce their effectiveness, Exemption 7(E) applies even where the identity of the techniques has been disclosed." (*KXTV, LLC dba ABC10 v. United States Citizenship and Immigration Services*, Civil Action No. 19-00415-JAM-CKD, U.S. District Court for the Eastern District of California, Mar. 6)

Patrick Eddington, a researcher at the Cato Institute, has filed multiple complex requests to agencies recently, often requesting expedited processing as well, designed to challenge agencies' ability to respond within the statutory time limit. In the first of his suits to reach a decision, Judge James Boasberg has ruled that Eddington **failed to exhaust his administrative remedies** by not clarifying his request for how the U.S. Postal Service would respond to a registration or detention program aimed at ethnic or religious minorities. The Postal Service told Eddington that it had 30,000 facilities and needed Eddington to narrow the scope of

his request. Instead of narrowing his request, Eddington appealed and agreed to limit his request to five specific offices. After his appeal was denied, Eddington filed suit. USPS argued that Eddington's request was far too vague and unfocused, leaving the agency with the impossible task of trying to interpret the meaning of Eddington's request. Boasberg pointed out that "this requires USPS to research the question and decide to which nations it applies; Plaintiff should have done this homework himself." Boasberg observed that "how is USPS to determine what 'ethnic, religious, or racial heritage groups' are *not* 'present in the United States'? In other words, where does this definition finds its limit?" He indicated that the only solution was for Eddington "to start over with a clean, comprehensible request." He noted that "there can be no doubt that these deficiencies have deprived USPS of 'an opportunity to exercise its discretion and expertise on the matter.' It has not yet had a chance to even search for records sought by a request that reasonably describes its target." (*Patrick Eddington v. United States Postal Service*, Civil Action No. 19-2984 (JEB), U.S. District Court for the District of Columbia, Mar. 6)

Judge Beryl Howell has ruled that David Wattleton failed to show that the Social Security Administration received his February 2019 FOIA request for copies of his W-2 Forms for taxable years 1986-1999, although the agency acknowledged receiving a similar request from Wattleton in April 2019, which, since it did not cite FOIA was treated instead as a Privacy Act request. Until Wattleton filed suit, claiming the agency had failed to respond to his February 2019 FOIA request, the agency was unaware of the request. However, it conducted a search for the request but only found Wattleton's April 2019 request, which, under the agency's internal policy dealing with first-person requests, was being processed as a Privacy Act request instead. Wattleton argued that an August 9, 2019 response he received from the agency confirmed that the SSA had received his request. But Howell explained that the August letter actually related to Wattleton's separate April 2019 request, which was being processed under the Privacy Act, not his alleged February 2019 request. Addressing Wattleton's FOIA request claim, Howell indicated that he had failed to show that the agency had received the request. She noted that "the purported copy of the February Request attached to his complaint, which is undated and unsigned, is insufficient to generate a genuine dispute of material fact regarding SSA's alleged receipt of the request. The plaintiff's reliance on the August Response is similarly ineffectual as the document is clearly a response to a different document request." Although Wattleton's separate request that was being processed under the Privacy Act was not even part of Wattleton's complaint, Howell decided to deal with it as well. Wattleton argued that the agency could not use its internal policy as the basis for requiring processing under the Privacy Act before being considered under FOIA. Howell disagreed, noting that "plaintiff has failed to offer any argument as to how SSA's reliance on its own internal procedures was somehow more restrictive to his request for information than if SSA processed the request under FOIA. To the contrary, SSA's policy was to apply the available procedure that provides *more* access to records." The agency had not begun to process his Privacy Act request because he had not provided additional identifying information. Howell pointed out that "to date, the plaintiff has failed to provide this supplemental information. This failure to perfect the April Request constitutes failure to exhaust administrative remedies." (*David Earl Wattleton v. Nancy A. Berryhill*, Civil Action No. 19-1404 (BAH), U.S. District Court for the District of Columbia, Mar. 3)

By the time he has finished with his quixotic attempt to force the government to disclose an email sent by a DynCorp attorney, which became part of the record in a Department of Labor administrative proceeding and has been consistently withheld as privileged by district court judges in the D.C. and Eighth Circuits, attorney Jack Jordan may well have brought suit in every circuit in the United States. He has now opened up a new front by using surrogate Sandra Immerso to sue in the Eastern District of New York. Jordan started this quest by suing the Department of Labor, which withheld the email as privileged under Exemption 4 (confidential business information), but has also sued the Department of Justice on the theory that it now has a

copy of the email because it represented the Labor Department in his FOIA suits in the D.C. Circuit and the Western District of Missouri. However, the suit in the Eastern District of New York is against the Department of Labor and asks for discovery. The federal court in New York rejected that claim. The court noted that "to grant Plaintiff's motion to compel would. . .have the effect of granting the substantive relief Plaintiff requests in this FOIA action: to production of an unredacted copy of the Powers Email. It would also have the effect of adjudging that the DOL improperly redacted certain portions of the Powers Email." The court pointed out that it "finds no reason to allow Plaintiff to use a motion to compel as a tool to circumvent the purpose, scope and limitations of FOIA actions." (*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, Mar. 2)

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