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Washington Focus: In several declarations filed by State Department FOIA Officer Eric Stein to explain why the agency can't meet looming deadlines in a number of FOIA cases, Stein told judges that the COVID-19 virus has wreaked particular havoc with the cadre of retired foreign service officers that the agency relies upon to review documents for disclosure. Josh Gerstein of POLITICO reported that Stein indicated that the retired foreign service officers were particularly poor candidates for telework and told the judges that he had ordered the retired employees to stay out of the office for "several weeks." Stein explained that "many of them are within the age groups identified by the CDC as being at higher risk for serious illness from COVID-19." Gerstein added that the most recent State Department annual FOIA report shows an increase of 11,106 cases in the agency FY-19 backlog.

Court Examines Agencies' Role in Defining Agency Records

Ruling in a case brought by journalist Barton Gellman for records from various intelligence agencies about himself, Judge Christopher Cooper has found that with occasional exceptions most of the agencies' properly processed Gellman's requests. Gellman covered the classified information leaks of former National Security Agency contractor Edward Snowden for the *Washington Post* and is in the process of writing a book about Snowden. As part of his research, Gellman submitted nine requests to various intelligence agencies for records that mentioned his name.

One of the most interesting issues that came out of the way in which Gellman framed his request was an unnecessarily complex discursion in to what constitutes a record as the agencies scrambled to dissect email chains that often mentioned Gellman in one segment but were not otherwise about him in a broader sense into multiple records to avoid running afoul of the D.C. Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the D.C. Circuit held that agencies could not withhold records based on their assertion that they were non-responsive

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to the request, but, instead, could only withhold records based on a FOIA exemption. The *AILA* decision recognized that trying to separate out non-responsive records from other portions of responsive records would require agencies to reconsider and recast what constituted an agency record. Whereas previous to *AILA*, entire documents would normally be considered the agency record responsive to a request, to avoid running afoul of its holding prohibiting agencies from withholding records merely because they were considered non-responsive, after *AILA*, agencies have been forced to become more creative. Nowhere is that more apparent than in how to treat email chains that are frequently made up a conglomeration of non-responsive and responsive records. In Gellman's case, the Department of Justice's Office of Information Policy had divided email chains into three discrete groups – (1) multiple emails on disparate topics, only some of which pertained to Gellman, (2) emails to or from Gellman himself, which OIP claimed were expressly excluded from the scope of his FOIA request, and (3) compilations of press articles on disparate topics, where only some articles pertained to Gellman.

Cooper started with an exploration of what is a record and who decides. He pointed out that "as with all other aspects of FOIA, the agency first decides, and it is then the court's job to determine if the agency's explanation for its decision is reasonable. The agency defines the scope of the record when it begins to process a particular request. And it cannot flip its position on the scope of a record mid-litigation. Once an agency defines the scope of what constitutes a record, it must abide by that definition and may not make 'non-responsive' redactions within the record. If the agency is consistent from the start, the court must then determine whether the definition of the record was reasonable under the circumstances."

He indicated that "the D.C. Circuit has set some broad guideposts for determining whether an agency has reasonably defined the contours of a record. First, it has directed agencies and courts to OIP's guidance on this question. Second, the Circuit has 'set a minimum bar for what *cannot* reasonably be considered a discrete, non-responsive record,' namely 'a single (or perhaps a few) sentences within an otherwise responsive paragraph.'"

Turning to an examination of how OIP had separated the emails into individual records, Cooper noted that "the agency withheld all unique emails that it deemed non-responsive, including by redacting any non-responsive emails that appear on the same page as responsive ones. Gellman objects to that approach. He would have the Court hold than an agency may never break up email chains to define individual emails as records. But that is not the law." He pointed out that "because agencies 'in effect define a "record" when they undertake the process of identifying records that are responsive to a request,' the agency is not locked into defining the scope of a record according to the form in which the records are collected. Defining the scope of a record occurs after the initial collection of potentially responsive records, not before. True, how a record is stored by the agency can be a factor in determining whether the agency's definition of a record is reasonable. But the mere fact that there is a single document with a single stamp [for court identification purposes] for multiple emails does not alone mean that the agency has defined the entire page as a single record."

Gellman argued that "defining individual emails within a chain as distinct records is unreasonable in general because email chains are 'commonly understood to operate as a singe record.'" Cooper replied by noting that "that is indeed how email chains are most commonly understood. . .But, while it may usually be true that email replies reflect a natural progression of conversation on a unified topic, it is not always true. There are some circumstances where a single email chain contains discussion of unrelated topics that may reasonably be delineated into individual records, especially in light of a particular FOIA request." As an example, Cooper pointed to an email chain that mentioned Gellman but whose main body dealt with an article in *Foreign Policy* about then Attorney General Eric Holder. OIP disclosed the portion mentioning Gellman but separated out the rest of the email chain because it was non-responsive. Cooper agreed, noting that "read

in that light, it was reasonable for OIP to decide, while processing this FOIA request, that each individual email constituted a record."

The government also withheld records under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Cooper approved of claims from the Office of the National Director of Intelligence for seven of eight categories withheld under Exemption 1, but questioned ONDI's claim that responding to press inquiries qualified as an intelligence method. He declined Gellman's suggestion that he review the documents *in camera*, ordering the agency to either disclose non-exempt information or supplement its affidavits to justify its exemption claim.

OIP also withheld on behalf of ONDI copyrighted bulletins summarizing intelligence news reports that were prepared by a contractor for distribution to ONDI staff under **Exemption 4 (confidential business information)**. Gellman argued that the bulletins were neither confidential nor commercial. Cooper accepted the claim, pointing out that "ODNI presumably awarded the vendor its contract, in some part at least, because of how it formats, designs, and organizes its product. While not exactly the crown jewels, if competitors had access to that copyrighted information, it could implicate the vendor's commercial interest in maintaining the contract." Gellman argued that even though the format itself might be protected, the substance of the news reports was not itself confidential. As a result, Cooper ordered the agency to provide the substance of the articles.

Addressing OIP's Exemption 5 claims, Cooper, like other D.C. Circuit district court judges, agreed with the agency that discussions of how to respond to press inquiries could be protected by the deliberative process privilege. Gellman argued that since DOJ had a press policy, discussions related to responding to the press did not qualify as deliberative. Cooper disagreed, noting that "but a general press policy does not strip an agency's ability to deliberate about how to respond to specific press inquiries without losing the protection of the deliberative process privilege." He observed that "formulating responses to specific press inquiries is not simply explaining and applying a general policy of how to do so; those discussions contain actual deliberation related to the agency's public positions." (*Barton Gellman v. Department of Homeland Security, et al.*, Civil Action No. 16-635 (CRC), U.S. District Court for the District of Columbia, Mar. 20)

Views from the States

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

Colorado

A trial court has ruled that the Board of Regents of the University of Colorado violated both the Colorado Open Records Act and the Colorado Open Meetings Law when it declined to provide the *Daily Camera* student newspaper access to background information about five other candidates interviewed by the Board as finalists to become the President of the University of Colorado. In 2018, after then President Bruce Benson announced he was retiring, the Board of Regents hired a search firm and appointed a search committee. The search firm identified more than 100 candidates, of which 27 were qualified. The search committee interviewed 10 candidates and forwarded six of those candidates to the Board. After reviewing all six candidates, the Board voted unanimously to name Mark Kennedy as the sole finalist. Kennedy was subjected to a public vetting phase and the Board subsequently voted 5-4 to hire Kennedy. Under CORA, the

application materials for finalists for a chief executive position are subject to disclosure, while application materials for non-finalists are excepted from disclosure. The *Daily Camera* submitted a CORA request to the Board for the application materials of the other five candidates who were interviewed by the Board. Noting that they considered Kennedy to be the only finalist under the circumstances, the Board of Regents refused to disclose application materials on any other candidates. The *Daily Camera* then filed suit. The trial court ruled in favor of the student newspaper. The trial court noted that "the Board of Regents' interpretation of both CORA and COML is at odds with the plain and ordinary meaning of those terms. In asserting that the finalist is the person the Board decides to disclose to the public, the Board has inverted the meaning of the statutes. Under the statutes, 'finalists' are who must be disclosed to the public, and not, as argued by the Board, who the public institution decides to publicly disclose. In other words, CORA and COML dictate the records and information that must be disclosed. The Board of Regents does not have the unfettered authority to self-define the term 'finalist' as the person(s) whom the Board, in its sole discretions, determines will be disclosed publicly." (*Prairie Mountain Publishing Company v. Regents of the University of Colorado*, No. 2019-CV-33759, District Court, City & County of Denver, Colorado, Mar. 6)

Hawaii

The supreme court has ruled that the Attorney General failed to justify its claim of attorney-client privilege to protect a report prepared by the Office of the Auditor in response to a complaint by a state legislator. When Civil Beat requested the investigation report under the Uniform Information Practices Act, the Attorney General withheld the report claiming its disclosure would frustrate or harm government operations because the report was protected by the attorney-client privilege. The trial court agreed that the exception applied to the report. However, the supreme court reversed. The supreme court indicated initially that the trial court had not abused its discretion by reviewing the report *in camera*. The supreme court explained that "the discretion available to the court to conduct in camera review pursuant to the [statute] is broad and is not limited to instances in which one of the parties makes such a request." The supreme court agreed that the Attorney General could provide legal advice that qualified for protection under the exemption but pointed out that the Attorney General had not sufficiently justified its privilege claim here. Instead, the supreme court observed that "by providing it to the legislature, the Department was not necessarily rendering legal advice. The contents of the report itself are factual, implying that it was not intended to serve as legal advice, but rather as a summary of the facts." Dismissing the government's affidavit as inadequate to demonstrate the privileged nature of the report, the supreme court added that "without evidence that the communication actually was for the purpose of providing legal services, the conclusion that it was a lawyer-client communication is unsupported." (*Honolulu Civil Beat, Inc. v. Department of the Attorney General*, No. SCAP-17-0000480, Hawaii Supreme Court, Mar. 11)

New York

A court of appeals has ruled that the publisher of an online newspaper covering Westchester, Putnam, and Rockland Counties is not entitled to attorney's fees for its FOIL litigation filed against the New York State Thruway Authority because the agency failed to respond within the statutory time limit. The online paper requested communications concerning the decision to shift Rockland-bound traffic from the old Tappan Zee Bridge to the Gov. Mario M. Cuomo Bridge in August 2017. After the agency failed to respond on time, the online newspaper filed suit. While the litigation was pending, the Authority disclosed 1,320 pages of records. The Authority asked the court to dismiss the litigation as moot, arguing that all responsive records had been disclosed. The online newspaper objected, arguing that many of the disclosed records were duplicative. The court denied the online newspaper's request for attorney's fees. The online newspaper appealed to the court of appeals. Upholding the trial court's decision not to award fees, the appeals court noted that "petitioner's sole contention in its petition was that respondent's failure to provide the requested documents by the anticipated

response date set by respondent constituted a constructive denial of the request. Given that respondent ultimately disclosed 1,320 pages of documents during the pendency of this special proceeding, the claim of constructive denial was rendered moot." The appeals court indicated that "respondent's disclosure of 1,320 pages of documents after this proceeding was commenced supports a finding that petitioner has substantially prevailed in this FOIL proceeding. However, petitioner has failed to establish that respondent 'either lacked a reasonable basis for denying access to the requested records or 'failed to respond to its request or appeal within the statutory time.'" (*In the Matter of Gannett Satellite Information Network, LLC v. New York State Thruway Authority*, No. 527904, New York Supreme Court, Appellate Division, Third Department, Mar. 12)

The Federal Courts…

Judge Amy Berman Jackson has ruled that while the Department of Justice has justified its **Exemption 5 (privileges)** claims, it has so far failed to show that it **conducted an adequate search** and that its categorical claim that **Exemption 7(A) (interference with ongoing investigation or proceeding)** applies to more than 20,000 pages. The Brennan Center for Justice submitted a FOIA request for records concerning an investigation of state voting practices announced by the DOJ Voting Section under the National Voter Registration Act. The agency divided its responses into four categories – three of which consisted of emails from one to five pages in length – while the fourth category encompassed more than 20,000 pages of records collected as part of the investigation. Berman Jackson reviewed the shorter documents *in camera*. Berman Jackson found that "DOJ's search was inadequate because it did not tailor the search terms to plaintiff's specific request but simply piggy-backed on work that was already done in a somewhat related area. The search terms were focused on the [Presidential Advisory Committee on Election Integrity which was part of litigation by the Brennan Center in the Southern District of New York]. . .Indeed, it is unclear why the names of those on the [advisory committee] were used as search terms, since defendant has not stated what their connection to the Letter [announcing the voting investigation] might be." Berman Jackson added that the agency did not provide "any details as to how the search for electronic files, as opposed to emails, was conducted, and it has not provided any details as to how the search for hard copy file was conducted or how the filed are maintained. . .[The agency] does not explain how electronic files are organized, if there is a shared drive that contains all electronic files or if separate drives were searched, or what search terms were used." After reviewing them *in camera*, she found that the two categories of emails were privileged, while the emails in the other category were protected by Exemption 7(A). She noted that "the Court finds that defendant has sufficiently alleged that there are pending or prospective investigations." Three pages contained emails sent between an attorney in the Civil Rights Division and official of the government of Montana pertaining to a request for information regarding voter information. She found those emails protected by Exemption 7(A), noting that "the state's response to the request for information was compiled for law enforcement purposes in an investigation that is currently ongoing. If disclosed, it would interfere with a law enforcement proceeding, because it would disclose the agency's priorities in the investigation and certain strategies the agency may employ in collecting evidence." But she found the agency's *Vaughn* index covering the 20,000 pages to be insufficient. She pointed out that "the agency has simply lumped together thousands of pages of records – emails, memoranda, letters, draft legislation, legislation, published regulations and manuals – and asserts the pages 'include documents' exempted under Exemption 5 and 7(A)." Berman Jackson observed that "DOJ's description of the fourth category in its *Vaughn* Index is far too general to provide the Court or the requester with enough information to determine whether Exemptions 5 or 7(A) are applicable. The agency does not explain with sufficient detail which of those thousands of pages of documents were withheld under the exemptions, and thus, the Court cannot determine from the *Vaughn* Index, whether either

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of the exemptions apply." (*Brennan Center for Justice v. U.S. Department of Justice*, Civil Action No. 18-1841 (ABJ), U.S. District Court for the District of Columbia, Mar. 25)

After reviewing the Ledgett Memorandum *in camera*, Judge Colleen Kollar-Kotelly has ruled it was properly withheld under **Exemption 5 (privileges)** because it is protected by the presidential communications privilege. The existence of the Ledgett Memorandum became public when it was identified in the Mueller Report. The memorandum was written by former Deputy Director of the National Security Agency Rick Ledgett and memorialized a phone conversation that then NSA Director Mike Rogers had with President Donald Trump on March 26, 2017 in which Trump complained that the investigation into Russian interference with the 2016 election was "messing up" Trump's ability to get things done with Russia. Because the Ledgett Memorandum was responsive to a FOIA request from the Protect Democracy Project for records related to the Mueller investigation, the NSA originally invoked a *Glomar* response neither confirming nor denying the existence of records, claiming the memo was protected by the presidential communications privilege. But because the existence of the memo had been officially acknowledged in the Mueller Report, Kollar-Kotelly agreed that a *Glomar* response was inappropriate under the circumstances. She also indicated that the memo might well be covered by the presidential communications privilege but decided to review it *in camera* so that she could better consider PDP's argument that portions of the memo were no longer privileged because of its acknowledgment in the Mueller Report. After concluding her *in camera* review, Kollar-Kotelly had no doubt that the entire memo was protected by the presidential communications privilege. Kollar-Kotelly indicated that after reviewing the document *in camera* she was surprised that its contents did not discuss multiple distinct topics, as the agency's declaration suggested. Instead, she pointed out that "while the Memorandum concerns several topics, all are directly related to a central set of interrelated issues. Without *in camera* review of the Memorandum the Court would have held a distinctly different impression of what the Memorandum contained. This discrepancy is concerning, especially as courts routinely rely upon declarations in the FOIA context to determine whether documents were properly withheld." Nevertheless, she observed that "the Court's *in camera* review of the Ledgett Memorandum demonstrates that the conversation memorialize in the Memorandum involved advice solicited by, and provide to, the President that directly related to presidential decision-making with respect to foreign relations and intelligence-gathering activities." PDP suggested that the contents of the memo did not really deal with presidential decision-making issues and that the government misconduct exception should apply because the government misrepresented its actual contents. Pointing out that the leading case on the coverage of the presidential communications privilege was *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), Kollar-Kotelly explained that *In re Sealed Case* actually undermined the notion that misconduct could overcome the privilege. She pointed out that "this focus, and the subsequent discussion and citations, appear to suggest that any government misconduct exception does not apply in the same form – or with the same force – to the presidential communications privilege; it is instead a part of the determination of whether there is a need sufficient to overcome the privilege." PDP also argued that because the existence of the Ledgett Memorandum had been officially acknowledged in the Mueller Report, any portions of the memo that were reflected in the official acknowledgement should be disclosed. However, Kollar-Kotelly noted that "documents properly withheld under the presidential communications privilege are generally withheld or released in full." Applying that requirement here, she observed that "the information requested by the Project – the Ledgett Memorandum – is not as specific as the information previously disclosed and released in the Report." She pointed out that "even with respect to the information included in the Mueller Report, the Ledgett Memorandum contains more details." (*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. 23)

Judge Richard Leon has ruled that the FBI properly withheld records under **Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement**

records), and **Exemption 7(E) (investigative methods and techniques)** in response to FOIA requests from the Reporters Committee for Freedom of the Press concerning the FBI's policies for impersonating journalists. RCFP's requests were prompted by a 2007 incident at Timberline High School near Seattle when the FBI tricked the anonymous sender of an online bomb threat to reveal his online address by responding to a fake email from the FBI impersonating an AP reporter. In response to RCFP's requests, the FBI located 267 pages and disclosed 186 pages in full or in part. When RCFP filed suit, Leon ruled in favor of the agency, finding that its search was adequate as well. RCFP appealed, and the D.C. Circuit ruled that because the FBI's Director's Office was intimately involved in the agency's response to publicity related to the incident it should have been searched as well. While RCFP's appeal to the D.C. Circuit was pending, it submitted another FOIA request, updating the time frame for its first request and including new categories for records concerning a 2016 report by the Office of the Inspector General. RCFP sued after the agency failed to respond to the 2017 request and the agency located 611 pages of responsive records and disclosed 328 pages in full or in part. The Department of Justice claimed that large portions of the litigation were prohibited by both the law of the case doctrine and the doctrine of **collateral estoppel** which allows a court to dismiss a case where the same parties have litigated the same issue. Leon, however, pointed out that "a valid rationale for withholding one set of documents does not necessarily apply equally to every other set of documents." Dismissing the claims, Leon indicated that "adopting defendants' position that collateral estoppel applies when the agency's rationales for withholding documents are the same, regardless of what the specific documents are, would violate our Circuit's long held requirement that agencies justify withholdings with details specific to the documents at issue." The agency's Exemption 5 claims were divided into six categories. Leon joined other D.C. Circuit district court judges in finding that "if documents are 'generated as part of a continuous process of decision making' such as 'how to respond to on-going inquiries' from the press or Congress, they are predecisional and deliberative." He agreed that the FBI had properly withheld filled-in copies of forms that FBI personnel used to submit comments on the OIG draft report. He noted that "any factual comments are so intrinsically linked to the FBI's personnel's recommendations and opinions regarding the OIG draft report that disclosure could expose the deliberative process." Leon also allowed the agency to withhold discussions on how to use an investigative technique. While he found that the FBI had provided sufficient detail to adequately explain the foreseeable harm in disclosure of the six categories, Leon indicated that "I would, however, join the chorus of members of this court in rejecting the Government's position that general assertions of harm to the deliberative process privilege are sufficient to satisfy the 'heightened standard' of the FOIA Improvement Act's 'foreseeable harm' requirement. They are not. The Government would be wise in the future to heed such rulings." Leon approved of the agency's use of the privacy exemptions to withhold third-party personally identifying information, observing that "plaintiffs have failed to show how the release of any of these names or identifying information will help the public determine whether FBI officials engaged in illegal or unconstitutional activity by impersonating journalists." RCFP challenged the agency's use of Exemption 7(E) by arguing that impersonating a journalist was a publicly known technique. But Leon noted that "the fact that a law enforcement technique is generally known does not mean its specific procedures or applications are known or that disclosing them would not risk compromising specific investigations." On the agency's withholding of 10 pages of records on an undercover operation, Leon observed that he was satisfied that "the FBI's procedures relate to techniques and methods for surreptitiously investigating potential criminals and engaging in undercover operations." (*Reporters Committee for Freedom of the Press, et al. v. Federal Bureau of Investigation, et al.*, Civil Action No. 15-1392 (RJL), U.S. District Court for the District of Columbia, Mar. 20)

A federal court in Massachusetts has ruled that U.S. Immigration and Customs Enforcement failed to show that it properly withheld records under **Exemption 5 (privileges)** in response to two FOIA requests submitted by the ACLU of Massachusetts pertaining to a 2019 speech made by Michael Albence, then ICE

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Director for Enforcement and Removal Operations, to the National Association of Sheriffs. ICE located 141 pages of responsive records. The agency withheld several drafts of Albence's remarks, as well as a draft agenda for the conference created by NSA and sent to ICE. Aside from its Exemption 5 claims, ICE also withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods or techniques)**. The court found that the draft talking points, which were created by the Office of Public Affairs, and emails related to them were not deliberative and that the final version of the draft talking points was also not pre-decisional. The court pointed out that "here, ICE has proffered no evidence that any of three versions of the draft talking points involve not-yet-finalized policy decisions or were otherwise bound up with policy matters." The court indicated that "rather than correlating to or preceding another decision, the last-in-time version of the draft talking points is itself *post-decisional*; the relevant agency decision – determining the subject matter and substance of the talking points that ICE officials could refer to when presenting to NSA conference attendees – was resolved when the OPA finished its drafting and editing process." The agency argued that Albence could have changed the remarks when he delivered them, meaning that the final decision had not been made beforehand. The court rejected that argument, explaining instead that "whether or not the last-in-time version of the draft talking points was read verbatim, loosely paraphrased, or entirely disregarded, that document remains the final product of an agency decision-making process." The court indicated that the draft agenda from NSA was not subject to Exemption 5 because NSA did not qualify under the inter- or intra-agency threshold requirement. Acknowledging the existence of the consultant corollary exception, the court observed that "there is no colorable argument to support the invocation of Exemption 5 to protect a document created by a non-federal entity not serving as a paid consultant to the agency and not otherwise protected by another FOIA exemption." (*American Civil Liberties Union of Massachusetts, Inc. v. U.S. Immigration and Customs Enforcement*, Civil Action No. 19-10690-LTS, U.S. District Court for the District of Massachusetts, Mar. 24)

A federal court in New York has ruled that the Department of Veterans Affairs may not withhold a database of deceased veterans' benefit claims merely because the Veterans Health Administration inadvertently mixed in benefit claims for veterans who were still alive when it disclosed the database to Ancestry.com in 2010. In response to a request from Reclaim the Records, a group of genealogists, historians, and journalists which collects genealogical and archival data sets, for records from the same dataset disclosed to Ancestry.com, the VA withheld the database under **Exemption 6 (invasion of privacy)**, arguing that because it could not quantify how many records in the database contained information about veterans who were still alive, disclosure of the database would constitute an unwarranted invasion of privacy. Reclaim filed an administrative appeal arguing that the disclosure of the dataset to Ancestry.com meant that the records were now in the public domain. Instead, the VA characterized the Ancestry.com disclosure as an erroneous data breach. After Reclaim filed suit, the VA indicated that it had found that 5 million records of the 14.4 million records previously released to Ancestry.com pertained to deceased veterans, but ultimately concluded that the post-2010 data on deceased veterans was so filled with errors that it could not disclose it without risking disclosure of information on veterans who were still alive. District Court Judge Paul Engelmayer sided with Reclaim's public domain argument as to a 1850-2010 dataset. He noted that "Reclaim is requesting the same information, at the same level of specificity, as was disclosed to Ancestry.com through its 2011 FOIA request, and that information remains accessible to the public via the Ancestry.com website. The VA does not seriously claim otherwise. Instead, it argues that the disclosure of this data was 'erroneous' and 'inadvertent,' and therefore should be treated differently." The VA argued that even though the Ancestry.com data was public, a further disclosure might still cause harm. Engelmayer rejected that argument as well, pointing out that "that concern is solely theoretical here, insofar as the same information is available – and has been for nine years, pursuant to an agency FOIA disclosure – on a readily accessible public website that the VA is making no attempt to strip of such information." As to the post-2010 data, the VA contended the data was so riddled with errors that it could not be disclosed. Engelmayer pointed out, however, that "the FOIA statute

does not give an agency license to broadly withhold non-exempt records because the agency has errantly commingled them with exempt records. VA does not cite any case authority permitting an agency to invoke an otherwise unavailable exemption because its own carelessness has complicated the process of separating exempt from non-exempt materials." Recognizing the scope of cleaning up the database, Engelmayer give the VA two years to accomplish that goal. (*Reclaim the Records v. Department of Veterans Affairs*, Civil Action No. 18-8449 (PAE), U.S. District Court for the Southern District of New York, Mar. 24)

A federal court in Colorado has ruled that except for its interpretation of the scope of the FOIA request submitted by Rocky Mountain Wild the Bureau of Land Management **conducted an adequate search** and has rejected Rocky Mountain Wild's request for **discovery**. Rocky Mountain Wild submitted a FOIA request to BLM's Colorado field office involving proposed oil and gas leasing of parcels in and around occupied Gunnison sage-grouse habitat. The request also referenced seven specific parcels. Based on where the parcels were located, the Colorado field office decided to search the Tres Rios field office and the state office's Branch of Fluid Materials as most likely to have responsive records. The agency disclosed more than 1,700 records in two installments before Rocky Mountain Wild filed suit. The agency then provided a final third installment of 346 pages, some with redactions. The agency also indicated that it was withholding 63 pages in full. The agency conducted a supplemental search which yielded 320 additional pages, redacting 27 pages and withholding 76 pages. Rocky Mountain Wild challenged the adequacy of the search, arguing that the agency should have searched its Washington office as well and should have expanded the search terms. District Court Judge William Martinez \rejected those claims but agreed with Rocky Mountain Wild that the agency had improperly narrowed the scope of the request to only the seven parcels Rocky Mountain Wild referenced. Martinez pointed out that "there is no reasonable basis to think that Rocky Mountain Wild was genuinely interested in only a subset of parcels considered for that lease sale, to the exclusion of any others." Because BLM had agreed to conduct a supplemental search, Rocky Mountain Wild argued that it should have broadened the temporal scope of its search. Rejecting the claim, Martinez noted that "if the Court were to hold in these circumstances that an agreement to conduct a supplemental search obligates the agency to expand the temporal scope of the search vastly beyond the original temporal scope, agencies would have little incentive to pursue the compromise that BLM pursued in this case." (*Rocky Mountain Wild v. United States Bureau of Land Management*, Civil Action No. 18-0314-WJM-STV, U.S. District Court for the District of Colorado, Mar. 23)

Judge James Boasberg has once again ruled that while the IRS has justified its *Glomar* response neither confirming nor denying the existence of records concerning the use of whistleblowers to uncover tax fraud committed by Thomas and Beth Montgomery, it has failed to show that it **conducted an adequate search** for records responsive to some of the Montgomerys' multiple requests. Thomas Montgomery set up several partnerships in the early 2000s that allowed him and his wife Beth to claim non-existent business tax losses on their personal tax returns. After the IRS investigated the structure of the partnerships, it imposed penalties and disallowed some claimed losses. The Montgomerys filed several suits that were consolidated, and the cases were ultimately settled, entitling the Montgomerys to more than $485,000. The Montgomerys then submitted multiple FOIA requests aimed at trying to identify a possible whistleblower. In his most recent decision in the case, Boasberg found that the agency had justified its *Glomar* response for records pertaining to whistleblowers but had not shown that it conducted an adequate search. Boasberg ordered the agency to conduct a supplemental search of its Whistleblower Office. The agency did so, told Boasberg that it found no responsive records, and continued to claim a *Glomar* response for any whistleblower records. The IRS argued that it was only obligated to search through its litigation files pertaining to the Montgomerys. But Boasberg explained that the Montgomerys "pointed to a location – the Office of Tax Shelter Analysis – that would seem

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to be a natural location for responsive documents. While Plaintiffs' failure to mention this repository previously weighs slightly against mandating a further search, the burden is ultimately on the Government to demonstrate the adequacy of its search, not on Plaintiffs to learn the intricacies of a complex bureaucracy and then consistently suggest, in advance the best locations to search." Further, Boasberg indicated that the search of OTSA yielded over 1,000 responsive pages. He pointed out that "perhaps the revelation of a trove of over 1,000 pages of responsive documents upon searching just one additional database should have caused the agency to 'revise its assessment.' Perhaps not. The agency, however, did not explain its reasoning, instead deciding *sua sponte* that it would only search databases mentioned by this Court in its prior Opinion." Boasberg agreed this time that the IRS had justified its reliance on a *Glomar* response by tethering its response to **Exemption 7(D) (confidential sources)**. (*Thomas and Beth Montgomery v. Internal Revenue Service*, Civil Action No. 17-918 (JEB), U.S. District Court for the District of Columbia, Mar. 25)

Judge Tanya Chutkan has ruled that the Executive Office of U.S. Attorneys **conducted an adequate search** for Exhibit C, a document that was part of the court record of the prosecution of Ibrahim Elgabrowny for conspiracy to blow up the World Trade Center in 1993, even though the agency was unable to locate the document after multiple searches. Elgabrowny made two separate requests – one for Exhibit C and another for a July 22, 1994 letter sent by the government to Elgabrowny's defense counsel informing him that the government had filed a petition for non-disclosure of classified information. However, EOUSA consolidated the requests and acted as if the two documents were the same. Chutkan noted that "while the two documents share commonalities, and were purportedly executed around the same time, Plaintiff has specified that they are separate documents." EOUSA also informed Elgabrowny that Exhibit C had been filed under seal and therefore could not be released. EOUSA concluded that the only likely location of Exhibit C was in the files of the U.S. Attorney's Office for the Southern District of New York. But after conducting a search "USAO-SDNY informed EOUSA that it could not locate Exhibit C, but that the case docket indicated that it once existed and had been filed under seal." EOUSA also decided that a May 26, 1994 letter written by Robert S. Khuzami was responsive to Elgabrowny's request and released it, although it never located either the July 22, 1994 letter or Exhibit C. Elgabrowny argued that EOUSA was intentionally concealing the document and suggested that a memorandum on court security procedures made EOUSA responsible for archiving the records. But Chutkan pointed out that the memo's "plain language clearly delegates post-trial responsibility for handling classified information to the court, not the relevant agency." Elgabrowny argued that the agency should have looked for other documents that referred to Exhibit C. But Chutkan observed that "plaintiff indisputably sought one page, Exhibit C, and despite the fact that he knew the Declarations and Memorandum existed, he declined to request them. Plaintiff went so far as to instruct EOUSA to refrain from searching its case files, which the agency nonetheless endeavored to do. EOUSA has therefore 'not run afoul of FOIA by failing to search for or produce records' that were not part of his narrowly-tailored Request." (*Ibrahim Elgabrowny v. Central Intelligence Agency, et al.*, Civil Action No. 17-00066 (TSC), U.S. District Court for the District of Columbia, Mar. 25)

A federal court in Illinois has ruled that with two exceptions the Department of State **conducted an adequate search** in response to Northwestern University political science professor Jacqueline Stevens' three FOIA requests for records concerning the agency's relationship with foreign campuses of American universities and properly withheld records under a variety of exemptions. The agency located and disclosed more than 500 pages with redactions. Stevens challenged the adequacy of the searches. The court rejected Stevens' allegations that the agency failed to search in all locations likely to have responsive records and that the agency did not use the search terms she provided. But the court agreed that the agency's searches of its Bureaus of Near Eastern Affairs and International Information Programs had only searched for the term "Northwestern University" rather than the broader "Northwestern." The court indicated that it "cannot say

that the NEA's and IIP's searches were reasonably calculated to uncover responsive records. Tellingly, every other subdivision used 'Northwestern,' rather than 'Northwestern University,' as their primary search term." The agency withheld course materials under **Exemption 4 (confidential business information)**. The court pointed out that the Supreme Court's recent decision, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), held that confidentiality was determined based on whether a submitter customarily treated information as confidential and private. Applying that standard, the court pointed out that "although [the professor] distributes those documents to paying students, she does not make them available to the public." (*Jacqueline Stevens v. United States Department of State*, Civil Action No. 17-2494, U.S. District Court for the Northern District of Illinois, Mar. 23)

Judge Emmet Sullivan has ruled that the Department of Justice **conducted an adequate search** for records concerning communications to and from the media pertaining to the activities of the FBI, the Office of Special Counsel Robert Mueller, and the Department of Justice during the investigation of Russian interference into the 2016 election and properly applied several exemptions to withhold or redact records in response to a FOIA request from Freedom Watch. Freedom Watch challenged the adequacy of the search, as well as withholdings under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. The Office of Information Policy conducted the search for the department, locating 5,881 responsive pages. OIP disclosed 3,939 pages in full and 1,941 pages with redactions. The FBI's separate search located 320 pages, disclosing 171 pages in full, 122 pages in part, and withholding 27 pages in full. Freedom Watch argued that the agency limited its search to electronic records and did not search paper records. But Sullivan indicated that "in this case, the FBI did not find any information or leads to extend its search beyond [Office of Public Affairs] records." Freedom Watch also argued the agency failed to identity who had conducted the searches. Sullivan observed that "courts in this District have repeatedly rejected the argument that an agency's declaration must identify individuals, by name, who conducted the searches." Finally, Freedom Watch faulted the agencies for not identifying the search terms used. Sullivan pointed out that "Freedom Watch does not challenge DOJ's search terms; thus, this Court will not micro-manage DOJ's searches." Sullivan agreed with other most district court judges in the D.C. Circuit that records concerning draft discussions pertaining to how to respond to press inquiries qualified for protection under the deliberative process privilege because they were both predecisional and deliberative. Freedom Watch speculated that DOJ had used the press inquiry discussions as part of final decisions. But Sullivan pointed out that "indeed, 'courts have generally found that documents created in anticipation of press inquiries are protected even if created after the underlying event about which the press might inquire' because 'the idea is that these sorts of documents reflect deliberations about the decision of how to respond to the press.'" Sullivan found that both the FBI and OIP properly withheld third-party personally identifying information under Exemption 6. Freedom Watch argued that *Simpson v. Vance*, 648 F. 2d 10 (D.C. Cir. 1980), held that third party information disclosed to the press did not qualify as similar files for purposes of Exemption 6. Sullivan, however, pointed out that "Freedom Watch is wrong on the law, and the D.C. Circuit's decision in *Simpson* upon which Freedom Watch relies is no longer good law," since the Supreme Court had abrogated its ruling in *Dept of State v. Washington Post*, 456 U.S. 595 (1982). Instead, Sullivan noted that "the release of information connecting any individual to 'the politically charged environment surrounding the SCO's work' would subject him or her to unwarranted harassment." (*Freedom Watch, Inc. v Robert S. Mueller, et al.*, Civil Action No. 18-88 (EGS), U.S. District Court for the District of Columbia, Mar. 23)

The Seventh Circuit has ruled that communications to and from the Attorney General concerning immigration appeals that are certified for executive decision were properly withheld by the Department of Justice under **Exemption 5 (privileges)**. The case involved a request from the National Immigrant Justice

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Center for records concerning communications pertaining to executive decisions across three presidential administrations. DOJ disclosed 1,000 pages but withheld 4,000 pages, including 300 pages withheld under the deliberative process privilege. After NIJC filed suit, it did not dispute that the withheld records were deliberative but argued instead that they constituted *ex parte* communications not subject to the privilege. The district court ruled in favor of the agency and NIJC appealed to the Seventh Circuit. The appeals court agreed with the district court, noting that "the documents, in short, embody precisely the type of legal and policy discussions and exchanges of ideas at the heart of the deliberative process privilege." NIJC argued that the communications constituted *ex parte* discussions because some DOJ attorneys representing immigrants before the Board of Immigration Appeals might later defend the government if the immigrant sued in federal court. The Seventh Circuit rejected the argument, pointing out that "in no way are the attorneys – at that point in the multi-step process that can result in an immigrant's removal – advising and assisting the Attorney General adverse to the noncitizens. Attorneys assisting the adjudicator do not engage in *ex parte* communications when performing their duties." The Seventh Circuit explained that "at no point do Office of Immigration Litigation or Solicitor General attorneys represent the Department in an adversarial proceeding before the Attorney General. Put another way, the unfairness that the *ex parte* communications doctrine seeks to prevent – namely that one party has the judge's ear while his adversary lacks the same opportunity – does not apply here." (*National Immigrant Justice Center v. United States Department of Justice*, No. 19-2088, U.S. Court of Appeals for the Seventh Circuit, Mar. 23)

The Ninth Circuit has ruled that the district erred in finding that FDA regulations prohibiting disclosure of Investigational New Drug files protected records requested by the Goldwater Institute concerning the approval of ZMapp, an investigational new drug intended to be used to treat persons infected with the Ebola virus. In response to a request from the Goldwater Institute, the FDA withheld the entire IND file. The Ninth Circuit observed that "by concluding that the FDA regulations governing IND applications barred disclosure of the IND file in toto, the court essentially concluded that the FDA regulations are coterminous with Exemption 4 [confidential business information.]" The Ninth Circuit pointed out that "nor do the affidavits submitted establish that the withheld documents contain confidential commercial or financial information covered by Exemption 4. The agency's argument boils down to the assertion that the documents *must* contain such information because they are in the IND file. But that is insufficient under FOIA." The Ninth Circuit indicated that "we do not discount the FDA's expressed policy concerns regarding the need to protect confidential information in IND applications. Nonetheless, on the present record, the agency has failed to meet its burden of establishing that the documents it withheld are exempt from disclosure under Exemption 4." (*Goldwater Institute v. U.S. Department of Health & Human Services*, No. 19-15615, U.S. Court of Appeals for the Ninth Circuit, Mar. 24)

The First Circuit has ruled that a 2017 EPA directive prohibiting researchers with EPA grants from serving on agency advisory committees was **justiciable** and properly stated a claim for violation of the fair balance representation requirements in the **Federal Advisory Committee Act**. The directive prohibited academic and public interest researchers with EPA grants from serving on advisory committees but did not restrict members with connections to industry. If academic or public interest researchers wished to remain on agency advisory committees, they were required to give up grants. The Union of Concerned Scientists filed suit, arguing that Elizabeth Anne Sheppard, one of its members, had suffered an adverse impact because of the new directive. A district court in Massachusetts dismissed the case, finding that the Union's claim was non-justiciable because the fair balancing requirements in FACA were too amorphous to be enforceable. The Union of Concerned Scientists appealed. The First Circuit agreed that the Union had stated a claim under FACA but rejected its alternative claim that an independent cause of action existed under the Administrative Procedure Act as well. The First Circuit relied on the recent Supreme Court decision in *Dept of Commerce v.*

New York, 139 S. Ct. 2551 (2019), interpreting the Census Act, finding that although it conferred broad authority on the Secretary of Commerce, it also provided standards to guide implementation. Based on *New York*, the First Circuit rejected the EPA's claim that the fair and balanced requirements in FACA were too vague for courts to apply. Instead, the First Circuit observed that "the fact that the statute leaves a great deal of discretion to the agency does not make actions taken unreviewable. Here, for example, if the agency announced that only persons paid by a regulated interested business could serve on a committee, we would expect that FACA's fair balance and inappropriate influence standards to supply a meaningful tool for reviewing such a new policy. To rule otherwise, would be to conclude that FACA failed to put an enforceable end to one of the very types of advisory relationships that prompted Congress to enact it in the first place." While the First Circuit admitted that the balancing requirements in FACA were broad, the appeals court pointed out that "sufficient standards exist for meaningful review of the decision-making process at issue here – even if those standards themselves preserve wide discretion." The First Circuit dismissed the Union's stand-alone claim under the APA, finding that its FACA claim, which would be reviewed under the APA's arbitrary and capricious standard, already encompassed any relief available for a stand-alone APA claim. (*Union of Concerned Scientists v. Andrew Wheeler*, No. 19-1383, U.S. Court of Appeals for the First Circuit, Mar. 23)

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