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*Washington Focus: The Department of Justice has declined to join a mandamus petition filed by former Secretary of State Hillary Clinton to the D.C. Circuit attempting to block District Court Judge Royce Lamberth's recent order allowing Judicial Watch to depose both Clinton and Cheryl Mills, her former chief of staff, concerning Clinton's use of a private email server when she was at the State Department. Although the State Department also opposes the deposition, DOJ specifically declined to join Clinton's petition. Writing for the National Review, Andrew McCarthy explained that "while [DOJ] continues to argue that it was wrong for the lower court to issue discovery orders, including depositions, these errors do not create the kind of dire harm a writ of mandamus is meant to address."*

## Court Faults OIP for Defining Records Too Narrowly

A slew of recent opinions have dealt with an issue created by the D.C. Circuit's opinion in *American Immigration Lawyers Association v. Executive Office of Immigration Review*, 830 F. 3d 667 (D.C. Cir. 2016), in which the appeals court held that agencies could not withhold records based on the agencies determination that they were non-responsive to the request, but, rather, could only withhold records based on an exemption claim. However, the D.C. Circuit also threw agencies a lifeline of sorts by suggesting agencies could redefine records by subdividing them into smaller separate records as long as there was some reasonable consistency in the way records were broken up and separated into smaller groups. Unfortunately, the circumstances existing in the *AILA* case were not typical of instances where some portions of a larger record are clearly not responsive to the subject matter or time frame of a request but are not otherwise exempt. Instead, EOIR had redacted the names of some administrative law judges who had been subject to complaints because the agency decided they did not fit within the specific types of complaints that AILA had requested. The D.C. Circuit found this level of parsing was too much and told EOIR that it could not withhold those kinds of records if they were not subject to an exemption.

In *AILA*, the D.C. Circuit suggested agencies use guidance issued by the Office of Information Policy explaining how a record was defined for purposes of the Privacy Act. To qualify for coverage under the Privacy Act, a record must refer to an individual's name or unique identifier. But the statute's definition of a record also provides that it must be "about" the individual as well. Since a primary purpose of the Privacy Act is to serve a records management function to collect and maintain personal information that is then subject to various protections – such as a right of access and amendment – the ability to define personal information protected under the Privacy Act serves a purpose different than defining agency records more generally.

In the wake of *AILA*, OIP updated its guidance on what constituted an agency record. The guidance included urging agencies to use the Privacy Act's definition of a record and to link records to the subject of the request. As to linking records, the guidance noted that "distinctions are most easily made when the document can reasonably be broken into discrete units. . .By contrast, if a document cannot be viewed as containing discrete 'terms or groupings' of information on different topics then it must be treated as a single 'record' and the entirety must be processed for exemption applicability."

Cause of Action Institute submitted a three-part FOIA request to OIP for categories of congressional correspondence designed to trigger the non-responsiveness issue. OIP located 1,021 pages of responsive records. Of those records, 816 pages were referred to various components. OIP disclosed 143 records altogether. OIP withheld 118 pages under Exemption 5 (privileges) and redacted one page under Exemption 6 (invasion of privacy). Another 34 pages were still pending as referrals but OIP indicated that some of those pages would be marked as non-responsive. COA filed suit, alleging that OIP had improperly withheld portions of three letters to Congress by separating them out and identifying them as non-responsive records. COA also argued that OIP had a policy or practice of violating FOIA by improperly defining records.

In determining whether portions of the Questions for the Record letters were responsive to COA's request, OIP explained to Judge Amy Berman Jackson that "a 'record' would consist of a question or a sub-question and any corresponding question." COA argued that definition was too narrow and that the agency was required to disclose the entire record, including all questions, sub-questions, and responses. Berman Jackson agreed that "the agency's decision to treat a sub-question as distinct from the overall question of which it was a part is too narrow." But she indicated that "plaintiff's definition, which would require disclosure of questions and responses that are wholly unrelated to plaintiff's FOIA request is too broad. The Court finds that a record in this case should be defined as a question, including all subparts or sub-questions, and any corresponding answers."

Berman Jackson indicated that her conclusion was based on *AILA* and subsequent district court decisions interpreting *AILA*. She pointed out that "by their nature, QFRs cover multiple subjects; the documents are compilations of multiple questions with questions organized by member, as opposed to by topic. At times, QFRs can 'consist of hundreds of pages of questions, and questions can come from dozens of Senators or Representatives. The organization of QFRs can vary: the questions may be sent in multiple files, divided by Senator or Representative, or they may be compiled into one large file.' Compiling different members' questions into a single document, and DOJ's responses into a singe response document, can be efficient, as it eliminates the need for members to send multiple letters to the Department and for the Department to direct separate responses to members."

COA argued that "because each letter and its attachments are maintained together as one unit, they should be considered one record." COA cited *American Oversight v. Dept of Health and Human Services*, 380 F. Supp. 3d 45 (D.D.C. 2019), in which the court faulted the agency's decision to withhold all responses from Congress to the agency in an email thread because the request only asked for communications *from* the agency to Congress as too stingy and literal. COA contended that the circumstances here were analogous. Berman

Jackson agreed with COA. She noted that 'the QFR and the response to it together make up one record because much like an email that is sent in reply, the response to a QFR incorporates the question, and together the two form a unified exchange. Within the unified exchange may be a sub-question, because a sub-question naturally pertains to the question in which it is embraced. Defendant's definition, which separates a sub-question and the response to it as a distinct record, is too narrow. If the umbrella question was disclosed, then logically any sub-questions and their corresponding answers should also be disclosed." But Berman Jackson found COA's definition too broad here as well. She observed that "it is unnecessary to disclose all QFRs and their responses to understand the ones that are responsive to plaintiff's FOIA request; nor are they necessary to provide context or helpful information."

Berman Jackson dismissed COA's policy and practice claim for failure to state a claim. She noted that "here, the Court has largely upheld the agency's application of its own policy; it took issue with just one specific aspect of the agency's subdivision of documents into records." She added that "any possibility that OIP's Guidance on what is a 'record' might result in unlawful withholding of information in future FOIA requests that plaintiff has submitted is speculative given the fact-specific nature of the inquiry." (*Cause of Action Institute v. U.S. Department of Justice*, Civil Action No. 18-2373 (ABJ), U.S. District Court for the District of Columbia, April 6)

## Views from the States

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

### Georgia

The supreme court has ruled that Edward Williams, a resident of DeKalb County, has standing to challenge whether the Board of Commissioners, and its individual members, violated the Open Meetings Act when it voted to increase commissioners' salaries during a public meeting without having provided notification of the agenda item before taking it up. The trial court ruled that individual members were immune from liability and that the commissioners' decision not to include the salary issue on the posted agenda constituted an exercise of judgment and was therefore a discretionary act. Williams then appealed to the supreme court. The supreme court dismissed the county's allegation that Williams did not have standing to bring suit. Instead, the supreme court observed that the statute "contemplates that a private person (or firm, corporation, or other entity) can bring an action to enforce the Act to protect the public from closed-door politics. It follows that, although only a prosecutor empowered to initiate a criminal prosecution on behalf of the State may seek a criminal penalty [under the statute], any person, firm, corporation, other entity, or the Attorney General may request that the trial court impose a civil penalty." The supreme court rejected the trial court's finding that individual commissioners were immune because they acted as a whole. The supreme court pointed out that "by definition, a meeting is a gathering of a group of individual persons to collectively carry out the work of governing an agency. It follows, contrary to the trial court's ruling, a person participating in a violation of the Open Meetings Act may be subject to criminal and civil penalties notwithstanding the agency or committee acting 'as a whole.'" (*Edward Williams v. DeKalb County*, No. S19A1163, Georgia Supreme Court March 13)

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## Massachusetts

The supreme judicial court has ruled that the disclosure requirements of the public records law conflict with the privacy protections of the Criminal Offender Records Information Act in such a way that to require municipal attorneys to provide all data elements of criminal history records to the Boston *Globe* would violate CORI but that by withholding two of 23 data elements the records' anonymity can be preserved sufficiently to comply with CORI. The case before the supreme judicial court was brought by district attorneys for Plymouth, Middle, and Cape and Islands districts. Those district attorneys argued that an agreement to allow the Boston *Globe* to use the publicly available portions of the database would still violate the CORI by allowing for the identification of individual criminal offenders. The supreme judicial court agreed but explained that by withholding two data elements the data could be disclosed. The supreme judicial court indicated that "we affirm so much of the judgment as orders the district attorneys within ninety days to produce requested information from their case management databases, except for docket numbers." The supreme judicial court added that "we also affirm so much of the judgment as declares the categories of requested data are public records under the public records law and are not exempt from disclosure, but only to the extent that these records do not directly identify any defendant. . ." (*Attorney General v. District Attorney of Plymouth District, et al.*, No. SJC-12722, Massachusetts Supreme Judicial Court, March 12)

The supreme judicial court has ruled that disclosure of booking photos and related records for two police officers and one district court judge who were arrested for drunk driving does not violate the Criminal Offender Records Information Act protecting the privacy of criminal offenders' records and that because the three are public officials, disclosure of their photos would be in the public interest. The Boston *Globe* requested the booking photos and records for all three individuals. The Boston Police and the State Police denied all three requests, arguing that the records were protected under CORI. The trial court ruled in favor of the Boston *Globe* and the police departments appealed. The case was then transferred to the supreme judicial court. While the case was pending, the state legislature amended CORI. As a result, the supreme judicial court decided to rule on the case based on the new amendments. The supreme judicial court noted that "the photographs are simply the product of the booking procedure arising from an arrest. Moreover, there is no suggestion in the record that any of the police officers or the judge was arraigned on charges arising from the incident reports, so both the incident reports and the booking photographs fail to satisfy that part of the CORI definition requiring that the records be recorded in a criminal proceeding where the defendant is arraigned. The police argued that the photos and records were protected by necessary implication. But the supreme judicial court indicated that "we are unwilling to declare that the CORI act absolutely protects from disclosure all records concerning offenses that were dismissed prior to arraignment or never reached arraignment." The supreme judicial court also found that disclosure of the records served a public interest. The supreme judicial court pointed out that "the public has a substantial interest in ascertaining whether the case was prosecuted because it lacked merit or because these public officials received favorable treatment arising from their position or relationship. Such matters implicate not only the integrity of the public officials who allegedly engaged in criminal conduct, but also the integrity of our criminal justice system." (*Boston Globe Media Partners, LLC v. Department of Criminal Justice Information Services, et al.*, No. SJC-12690, Massachusetts Supreme Judicial Court, March 12)

# The Federal Courts…

Judge Amy Berman Jackson has ruled that the National Nuclear Security Administration, the component of the Department of Energy responsible for operating and overseeing national laboratories, properly responded to a request from the Center for Public Integrity for records contributed by national labs

for the preparation of the Nuclear Posture Review, which was being conducted by the Department of Defense. In response to the Center's request, NNSA concluded that three labs – Los Alamos, Livermore, and Sandia – had contributed to the review and searched those labs. NNSA located 17 documents. It withheld one document entirely under **Exemption 5 (privileges)** and referred the other 16 documents to the Department of State for its review. State indicated that it had made no redactions but that the 16 documents still needed to be reviewed by the Department of Defense. DOD disclosed redacted versions of all 16 documents. Berman Jackson decided to review the 16 documents *in camera*. CPI only challenged exemption claims made under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(F) (harm to any person)**. CPI argued that the records withheld under Exemption 5 were not deliberative. After her *in camera* review Berman Jackson found that "the information is deliberative, and that defendants have not withheld purely factual information. The agencies withheld policy alternatives that were not ultimately adopted by the agency in the Nuclear Posture Review, as well as analyses of national security concerns related to foreign nuclear capabilities." She pointed out that "the reports lay out the pros and cons involved in a number of potential decisions, which is precisely what is meant by the 'give-and-take of the consultative process.'" Berman Jackson also rejected CPI's claim that the agencies had failed to explain the **foreseeable harm** from disclosure of these documents. Instead, she observed that "the information at issue is related to national security, and the agencies should be free to discuss proposals internally that did not ultimately find their way into the final policy statement of the agency – the Nuclear Posture Review. Furthermore, if disclosure was ordered, deliberations on sensitive nuclear policy matters would be impaired, which goes to the heart of the deliberative process privilege." The agencies withheld the names of lab employees and their email addresses under Exemption 6. After reviewing the redactions *in camera*, Berman Jackson noted that the agency released "the names of the individuals who were responsible for major decisions and who could have a financial interest in the nuclear policy decisions embedded in the final Nuclear Posture Review." She agreed with the agency that disclosure of identifying information of non-senior officials "would allow the general public to associate them with the planning of possibly controversial nuclear policy and their work at NNSA's laboratories, which relates to national security issues." Berman Jackson also accepted the redaction of two paragraphs under Exemption 7(F). She observed that "because the information relates to security concerns at nuclear facilities, and the declarants have credibly averred that disclosure could make these facilities targets of foul play and endanger the individuals who work thee of the public at large, the Court finds that the information was compiled for law enforcement purposes, and it falls within the exemption." She emphasized, however, that "defendants should keep in mind that future affiants should provide more information regarding when, by whom, and why the information was 'compiled' to show how the information falls within Exemption 7 in general, and not simply rely on the ability to satisfy subsection (F)." (*Center for Public Integrity v. U.S. Department of Energy, et al.*, Civil Action No. 18-1173 (ABJ), U.S. District Court for the District of Columbia, April 6)

Judge Dabney Friedrich has ruled that the Department of Interior has not shown any **foreseeable harm** from disclosure of records withheld under **Exemption 5 (privileges)** in response to two requests from the Center for Investigative Reporting. CIR's first request asked for communications between the staff of the Office of the Solicitor and outside entities pertaining to the Migratory Bird Treaty Act. The second request was sent to the National Park Service and asked for communications pertaining to the agency's report on sea level change in national parks. The agency's search for records responsive to the first request yielded 7,554 pages. The agency redacted portions of the records under Exemption 2 (internal practices and procedures), Exemption 5, and Exemption 6 (invasion of privacy). The NPS search located 3,075 pages of responsive records which were disclosed with redactions made under Exemption 5 and Exemption 6. CIR submitted a second FOIA request to NPS for records of communications between Maria Caffrey, an employee in the Colorado Field Office of the Department of Education, and Brendan Moynahan, an NPS employee. The

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agency located 1,691 pages responsive to the second request and determined that 1,600 pages responsive to the first request were also responsive to the second request. In response to the second request, the NPS redacted records pursuant to Exemption 2, Exemption 4 (confidential business information), Exemption 5, Exemption 6, and Exemption 7(A) (interference with ongoing investigation or proceeding). CIR only challenged the agency's conclusion that disclosure of records under Exemption 5 would cause foreseeable harm. Friedrich agreed that the agency's claim that disclosure of the records would cause foreseeable harm to the agency's deliberative process privilege was insufficient. She noted that "on the current record, the Department has not established a reasonably foreseeable link between these harms and the specific information contained in the withheld records. First, the Department merely asserts what *could* happen if this information were released. The Department has not even asserted, let alone established, that it is reasonably foreseeable that disclosing these records would lead to these harms. But the Department must show that disclosure *would* cause reasonably foreseeable harms, not that it *could* cause such harms." Friedrich explained that "the Department has not provided enough information about these record categories to establish a particular link between their disclosure and these purported harms. Again, the Department must 'connect the harms in a meaningful way' to the withheld records, 'such as by providing context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure." (*Center for Investigative Reporting v. United States Department of the Interior*, Civil Action No. 18-1599 (DLF), U.S. District Court for the District of Columbia, April 7)

Judge Dabney Friedrich has ruled that OMB failed to **conduct an adequate search** for records in response to two FOIA requests from American Oversight concerning allegations of White House interference in plans to relocate the FBI's headquarters because the agency improperly limited its search terms. OMB told American Oversight that its 16 search terms were overly broad. It conducted modified searches and while the searches yielded a large number of potentially responsive records, by the time OMB reviewed the records it concluded that only a handful were responsive. OMB ultimately disclosed four documents. American Oversight challenged the adequacy of the search. Friedrich agreed with American Oversight that the limitations OMB had put on the search terms made the search inadequate. She noted that "to begin with, while the request sought *all*. . .communications. . .regarding the FBI headquarters consolidation project,' OMB's search would not have captured documents referring to the FBI's headquarters by any name other than 'FBI headquarters' or 'FBI HQ.' Such a search could not be 'reasonably expected to produce' *all* communications regarding the FBI headquarters consolidation project." Friedrich rejected OMB's claim that "several of American Oversight's proposed search terms on the ground that the search term would return too many impertinent results." But Friedrich observed that 'even so, OMB could have used other search terms such as 'Trump Org' or 'Trump Hotels' to limit the result of the search to those relevant to American Oversight's request." Friedrich found OMB's search for the records responsive to American Oversight's second request lacking as well. She pointed out that the second search "imposed a subject matter limitation that was not present in either part of American Oversight's second request." She explained that "OMB justified this course of action by stating that both parts of the request 'did not expressly state a subject matter' and were thus 'overly broad.'" Friedrich observed that "nothing in the request, however, incorporated any limitation from those introductory paragraphs" and added that 'both parts of American Oversight's second request were more straightforward than the searches that OMB ultimately conducted." OMB withheld 12 documents under the **presidential communications privilege**. OMB had divided the 12 documents into four categories. While Friedrich agreed with OMB that one category clearly was privileged, the agency had not yet shown the privilege's applicability to the other three categories. She noted that "with respect to three of the above categories, OMB has failed to allege that the withheld documents related to matters of presidential decisionmaking. This Court has previously refused to grant summary judgment to an agency asserting the presidential communications privilege absent such allegations." (*American Oversight v. Office of*

*Management and Budget*, Civil Action No. 18-2424 (DLF), U.S. District Court for the District of Columbia, March 31)

Judge Carl Nichols has ruled that neither Public Citizen nor the Department of Housing and Urban Development have provided enough evidence for him to assess whether or not the department has a **policy or practice** of redacting portions of records because they are **non-responsive**. In response to Public Citizen's request for records concerning HUD's decision to deny Federal Housing Administration loans to DACA recipients, the agency disclosed records with redactions made under Exemption 5 (privileges) and Exemption 6 (invasion of privacy), as well as redactions labeled as non-responsive. Based on the D.C. Circuit's decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016), holding that agencies could only withhold records based on exemption claims, Public Citizen filed suit, alleging the practice violated FOIA. In *AILA*, the D.C. Circuit also suggested that to address the issue of non-responsiveness, agencies could consider dividing records into smaller portions to separate non-responsive portions from responsive portions. Nichols relied on *Shapiro v. CIA*, 247 F. Supp. 3d 53 (D.D.C. 2017), in which the district court found that it was "possible for a court both to pronounce general guidance on how to define the term 'record' and to be unable to make concrete determinations about specific redactions." Applying *Shapiro v. CIA*, Nichols noted that "the Court has before it no *Vaughn* index, no comprehensive list of challenged redactions, and no government affidavits explaining the rationale for considering all of HUD's specific redactions as records separate and distinct from the produced materials." Nichols pointed out that he did not believe "it makes sense to rule on some challenged redactions and then to have to revisit the topic in the context of additional documents." As a result, Nichols indicated that he would wait until HUD had finished reviewing the rest of the records, made its redaction claims and supported them with a *Vaughn* index. After that, Public Citizen would be given an opportunity to challenge the agency's claims. Nichols indicated that HUD's claim that *AILA*'s comments expressing skepticism that individual emails within email chains could not be considered individual records as dicta. Instead, Nichols observed that "while the Court can theoretically imagine a situation in which a single bullet point from a PowerPoint slide or a single email in a chain (or subdivision thereof) might be considered a separate record, it is skeptical that the government will be able to justify that step outside extraordinary circumstances." (*Public Citizen, Inc. v. United States Department of Housing and Urban Development*, Civil Action No. 19-00915 (CJN), U.S. District Court for the District of Columbia, March 26)

The Second Circuit has ruled that the OMEGA core model, developed by the EPA for use in aiding the agency to assess the impact of greenhouse gases on setting vehicle emissions standards under the Clean Air Act, is not deliberative and, thus not protected under **Exemption 5 (privileges)**. The National Resources Defense Council had requested access to the modeling data, arguing that it was factual in nature rather than deliberative. The district court ruled in favor of the agency and the NRDC appealed to the Second Circuit. The Second Circuit reversed, agreeing with the NRDC that the OMEGA core model involved no deliberations. The Second Circuit noted that "here, the record shows that to the extent the full OMEGA model reflects *any* subjective views, it does so in the input files, not the core model. It is the inputs that determine the constraints, predictions, and goals for each run of OMEGA." As a result, the Second Court explained that "the core model is thus akin to a specialized calculator, driven by the same algorithms to make the same calculations on every run of OMEGA." The EPA argued that the deliberative process privilege applied to fact-based records when disclosure might reveal the agency's decisionmaking process. The Second Circuit rejected the claim, noting that "EPA's argument stretches the deliberative process privilege too far. The release of the core model could, at most, reveal the various analytical tools EPA has at its disposal. It would not explain the factors that prompted development of a tool, nor would it expose rationales cutting against or in favor of its use." Finding

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that the core model did not qualify for protection under the deliberative process privilege, the Second Circuit observed that "the core model does not contain or expose the types of internal agency communications that courts typically recognize as posing a risk to the candor of agency discussion such as advice, opinions, or recommendations. Instead, it contains algorithms instructing the model on how to process the input data." (*Natural Resources Defense Council v. United States Environmental Protection Agency*, No. 19-2896, U.S. Court of Appeals for the Second Circuit, April 1)

Judge Dabney Friedrich has ruled that the Department of Treasury's Financial Crimes Enforcement Network **conducted an adequate search** for records concerning communications between FinCEN and the Government of Andorra or the Government of Spain after FinCEN imposed an anti-money laundering measure against Banca Privada d'Andorra and properly withheld records under **Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(D) (confidential sources)**, and **Exemption 5 (privileges)**. The request was made by Eric Lewis, an attorney who had represented BPA in a lawsuit against FinCEN. The agency located 528 pages, releasing six pages with redactions and withholding the remaining 522 pages. FinCEN conducted a second search, yielding 1,399 potentially responsive pages. The agency withheld 902 pages in full and disclosed 61 pages with redactions. Lewis argued that FinCEN had not shown that the records were compiled for law enforcement purposes. Friedrich disagreed, noting that "FinCEN's assertion that the records were created for various investigations – either its own enforcement actions or criminal actions in other jurisdictions – establishes a 'rational nexus' between its basis for compiling the records and its statutory law enforcement duties. . .Exemption 7 applies not only to domestic law enforcement purposes, but also to foreign law enforcement purposes. Information that FinCEN gathered to aid foreign law enforcement therefore still falls under the threshold inquiry because a connection exists between this information and FinCEN's statutory law enforcement duties." Friedrich pointed out that "while FinCEN is indeed a 'mixed function agency,' agencies that have both civil and criminal enforcement duties still can invoke Exemption 7 as long as they are compiled for law enforcement purposes." She observed that "contrary to Lewis' suggestion, FinCEN need not identify a particular individual or incident as the object of its investigation." Turning to Exemption 7(A), Friedrich pointed out that "for the purposes of Exemption 7(A), it makes no difference that disclosure would obstruct the law enforcement proceedings of a foreign agency rather than a domestic one." Lewis argued that Exemption 7(A) did not apply because some of the investigations were now closed. But Friedrich noted that "BPA's alleged activity involved investigations in a number of jurisdictions, and BPA's knowledge that some law enforcement actions have concluded does not preclude the existence of ongoing, confidential investigations in other jurisdictions." She agreed that FinCEN had divided its Exemption 7(A) withholdings into four functional categories that appropriately showed why disclosure would interfere with an ongoing investigation. Lewis challenged the agency's withholding of entire records under Exemption 7(D). But Friedrich indicated that "permitting FinCEN to withhold the entirety of these documents does not mean that an agency can withhold *all* information furnished by confidential sources, regardless of whether it was provided in the course of a criminal investigation. Exemption 7(D) 'applies to all information that would tend to reveal a source's identity,' not just to information that directly names a confidential source. FinCEN has demonstrated that, based on the specific facts at issue here, disclosing any information contained in the documents would reveal the identity of confidential sources. . ." (*Eric L. Lewis v. U.S. Department of the Treasury, et al.*, Civil Action No. 17-0943 (DLF), U.S. District Court for the District of Columbia, April 3)

Judge Amit Mehta has revoked his previous order allowing the law firm of King & Spalding to submit detailed justifications of its hourly rates as part of its motion for **attorney's fees** under seal after explaining that his original sealing order was granted based on his incorrect understanding that the government did not oppose the sealing order. Arguing in favor of retaining the sealing order, King & Spalding contended that

sufficient information about the basis for its attorney's fees award was already on the public record. But Mehta pointed out that "but what Plaintiff fails to appreciate is that the public interest in disclosure is arguably at its zenith when the fee demand is made against the public fisc. Indeed, there is something untoward about Plaintiff asking to conceal their hourly rates and the work done from public view, while demanding hundreds of thousands of dollars from the public treasury as compensation." Mehta pointed out that King & Spalding had also disclosed detailed attorney fees billing records in other federal litigation. He noted that "to be sure, the circumstances of previous disclosures may be different than the present case, and so too are the billing rates and work at issue. But the fact that multiple prior public disclosures of Plaintiff's billing rates diminishes the claimed need for confidentiality in this case. The court is also mindful that attorney billing records are routinely filed on the public record in this District, including in FOIA cases." He added that "the records that Plaintiff asks to keep under seal go to the very heart of what is before the court: questions concerning the reasonableness of Plaintiff's counsel's hourly rates and the reasonableness of the time they expended on this matter." As a result, Mehta ordered the sealed records disclosed. In response to Mehta's order, King & Spalding withdrew its attorney's fees request entirely. (*King & Spalding, LLP v. United States Department of Health and Human Services, et al.*, Civil Action No. 16-01616, U.S. District Court for the District of Columbia, April 7)

Judge John Bates has ruled that the Centers for Medicare and Medicaid Services has now sufficiently justified its claim that some records responsive to the Democracy Forward Foundation's request concerning the agency's Affordable Care Act enrollment outreach wee protected by **Exemption 5 (privileges)** and that it had conducted an adequate **segregability** analysis. CMS had withheld records dealing with discussions between the agency and consultant Weber Shandwick claiming it was covered by the **consultant corollary**. Since DFF did not oppose that characterization, Bates agreed that the exchanges were privileged. In his earlier opinion, Bates found that CMS's claims of segregability were too conclusory to grant summary judgment. However, this time, he approved the agency's supplemental affidavit providing more detail. Bates noted that "this declaration is significantly more substantive and detailed than either of the previous submissions. The first declaration stated only that the Final Report was advisory, without any real elaboration." Turning to a July meeting invitation, he pointed out that "the new declaration contains significantly more detailed information than the previous declarations, which stated only that CMS had 're-examined' the July meeting invite and that any release would 'result in a chilling effect for candor and frank information [when] presenting to CMS leadership.' As with the Final Report, then, the Court concludes that CMS is entitled to the presumption of compliance with segregability obligations for the July meeting invite." Bates rejected DFF's claim that the discussions might constitute the development of secret law, Bates observed that "Democracy Forward has proffered no quantum of evidence indicating that any recommendations contained in the challenged document have been 'adopted, formally or informally,' as the agency position. Moreover, to the extent that Democracy Forward argues that CMS simply did not evaluate the documents to see whether there was any reasonably segregable opinion material, this argument runs directly counter to the statements in the new declaration that CMS did, in fact, conduct 'a line by line review' of the documents and determined that there was *no* material that could be meaningfully segregated – fact, opinion, or otherwise." (*Democracy Forward Foundation v. Centers for Medicare & Medicaid Services*, Civil Action No. 18-635 (JDB), U.S. District Court for the District of Columbia, March 30)

Judge Rudolph Contreras has ruled that the FBI and the CIA have shown that they **conducted an adequate search** and properly withheld records under **Exemption 1 (national security), Exemption 3 (other statutes)** and **Exemption 7 (law enforcement records)** in response to two requests originally submitted by historian Carl Oglesby for records on himself. After Oglesby died, the litigation was pursued by his partner,

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Barbara Webster, and his daughter, Aron DiBacco. The agencies located 16,803 potentially responsive documents and agreed to a representative sampling chosen by the plaintiffs of 350 pages. The FBI winnowed that number down to 225 pages responsive to the request. A second *Vaughn* index was based on a representative sampling of 200 documents, which the FBI winnowed down to 116 total pages. Webster and DiBacco challenged the adequacy of the agencies' searches, arguing that the government should have searched other agencies or DOJ components for records. But Contreras pointed out that "to the extent that Plaintiffs are suggesting that the FBI erred by failing to properly coordinate with another agency or search another agency's records, they are mistaken. FOIA requests are properly directed to a particular agency or component." Contreras approved of the FBI's and the CIA's withholding under Exemption1 and Exemption 3. As to CIA claims, he noted that its affidavit "avers that the information withheld was properly classified because it concerned intelligence activities and its disclosure could reasonably be expected to result in damage to national security. According to [the CIA's affidavit] some of the withheld pages contain detailed information about human sources, while the disclosure of other material could reasonably be expected to reveal an intelligence method that is still in active use by the CIA." Contreras also approved of the withholding of third-party personally identifying information under **Exemption 7(C) (invasion of privacy concerning law enforcement records).** He pointed out that "Mr. Oglesby is correct, of course, that revealing the names of interviewees, investigation targets, and FBI personnel would shed some marginal light on how the FBI conducted its operations. But that is true of any request to disclose these kinds of information, and courts have repeatedly recognized that such exemptions can be justified." Contreras also approved of the FBI's withholdings under **Exemption 7(D) (confidential sources)** and **Exemption 7(E) (investigative methods or techniques)**. (*Barbara Webster, et al. v. U.S. Department of Justice*, Civil Action No. 02-603 (RC), U.S. District Court for the District of Columbia, March 31)

A federal court in South Dakota has ruled that Argus Leader Media is not eligible for **attorney's fees** after the Supreme Court ruled in favor of the trade association Food Marketing Institute when it successfully challenged an Eighth Circuit decision finding that redemption rates of food stamps at grocery stores were not confidential under **Exemption 4 (confidential business information)** because the agency and the business intervenors had not shown that disclosure would cause substantial competitive harm. However, after the Department of Agriculture decided not to appeal the Eighth Circuit ruling, Food Marketing Institute petitioned the Supreme Court to consider whether the substantial competitive harm test was contrary to the plain language of Exemption 4. In *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Supreme Court found the substantial competitive harm test was contrary to the language of Exemption 4 and opted to adopt a customarily confidential standard instead, in which records would be considered confidential if the business submitter customarily treated such records as confidential and the agency had agreed to treat them as confidential. Since both conditions were present under the circumstances, the Supreme Court majority ruled that the food stamp redemption rates were protected under Exemption 4. Because the district court had awarded Argus Leader Media attorney's fees previously for substantially prevailing in its litigation, the Argus Leader Media asked the district court to order the agency to pay the award, arguing that the Supreme Court decision only affected Food Institute Marketing members. The district court noted that "here, the question of whether the store-level SNAP [food stamps] data was protected from mandatory disclosure under Exemption 4 was permissibly decided by the Supreme Court." The district court observed that "in making these findings, the Court presumably found the issues to be sufficiently litigated or else it would have remanded the issues. In this court's review of the trial testimony, the Supreme Court's findings are supported by the evidence." The district court pointed out that "after review, this court does not see any open, unresolved issues of law or questions of fact, and neither has the Argus identified any undisposed of question or issues. Thus, on remand, the only tasks left before this court are ministerial duties of vacating any orders that are now inconsistent with the Supreme Court's rulings and entering judgment in favor of the USDA." The court rejected Argus Leader Media's argument that it had substantially prevailed by forcing the

government to change its policy on whether or not SNAP redemption data was confidential But the district court noted that "the information requested by Argus was not and will no be released by the USDA because the Supreme Court held that the information was confidential under Exemption 4. Ultimately, this court is entering judgment in favor of the USDA. Therefore, Argus has not substantially prevailed by a judicial order." The district court observed that "here, the catalyst theory is not applicable because there is no showing of a causation effect by Argus's lawsuit because the information was never released. Argus did not present any case law where a change in policy satisfies the change in position standard. Generally, most cases analyzing a change in position are based on the release of records." (*Argus Leader Media v. United States Department of Agriculture, et al.*, Civil Action No. 11-04121-KES, U.S. District Court for the District of South Dakota, April 1)

Judge Randolph Moss has ruled that the U.S. Marshals Service has not shown that it **conducted an adequate search** for records requested by prisoner Fulvio Flete-Garcia about his transportation from the Massachusetts Correctional Institution Cedar Junction in South Walpole, Massachusetts to the federal courthouse. Flete-Garcia submitted two requests for the same records. The first request indicated that records could be located at MCI Cedar Junction while the second request indicated the records would be located at USMS headquarters in Washington. In response to the first request, the agency located five pages in a database and disclosed them with redactions. When it received the second request, the agency told Flete-Garcia that it considered his second request as a duplicate of his first request and since the agency had already responded to his first request it took no further action on his second request. USMS also contacted the USAO office in Massachusetts but was told that it did not keep records indexed by individual prisoners and that it would at most only have accounting data used for reconciling the billing. Flete-Garcia challenged the adequacy of the search. Moss found the search wanting, noting that "simply naming databases and stating that they were 'searched' does not suffice. [The agency affidavit's satisfaction with the search] cannot substitute for the Court's, nor does [its] declaration provide the Court any details regarding search terms or methodologies, possible custodians, or whether additional databases or files might contain the requested records." Moss found the agency affidavit provided insufficient detail, pointing out that the affidavit "does not foreclose the possibility that those billing records might show if, and when, Plaintiff was transported between MCI Cedar Junction and the federal courthouse." Moss also indicated that Flete-Garcia had provided evidence that the USMS should have records about his transportation from Cedar Junction to the courthouse. Moss pointed out that "it may be that the USMS never maintained the records Plaintiff seeks or that it disposed of them at some time. But based on the barebones declaration the USMS proffers in support of its motion, the Court cannot determine whether the agency conducted an adequate search." (*Fulvio Flete-Garcia v. United States Marshals Service*, Civil Action No. 18-2442 (RDM), U.S. District Court for the District of Columbia, April 7)

Judge Rudolph Contreras has resolved much of the remaining FOIA litigation brought by federal prisoner Jeremy Pinson against various components of the Department of Justice – including 15 requests to the FBI, 24 requests to the Bureau of Prisons, two requests to the Office of Information Policy, four requests to the Office of the Inspector General, six requests to the Executive Office of U.S. Attorneys, and one request to the U.S. Marshals Service – as well as one request to the CIA, finding that the agencies conducted adequate searches or that Pinson had **failed to exhaust his administrative remedies** for many of his requests by either failing to file administrative appeals or to challenge agency fee assessments. Pinson claimed that he had not received agency responses for several requests. One such claim involved a fee assessment from the FBI, which Pinson asserted he had not received. Finding that agency had not carried its burden of proof on the issue of whether or not Pinson received the agency's response, Contreras explained that the FBI was not yet

entitled to summary judgment. He pointed out that "to win summary judgement based on failure to exhaust the Government would have to prove that Pinson either reached the end of his administrative remedies or had an opportunity to pursue further administrative remedies and did not do so. For Pinson's part, if he wants to move these claims forward he will have to pay the assessment, if he has not already done so." (*Jeremy Pinson v. U.S. Department of Justice, et al.*, Civil Action No. 18-486 (RC), U.S. District Court for the District of Columbia, March 30)

A federal court in Arizona has ruled that the ACLU of Arizona is entitled to **attorney's fees** for its litigation against the Department of Homeland Security pertaining to its request for records on the 2017 announcement of a terrorist ban. The ACLU of Arizona proposed that the agency process its request at the rate of 1,000 pages a month. Although the court agreed to the processing schedule, DHS unsuccessfully challenged it. DHS eventually agreed to process the remaining 2,241 potentially responsive records. The ACLU of Arizona then filed a motion for attorney's fees. The court found that the ACLU of Arizona's request was in the public interest. The court noted that "the information sought by Plaintiff was valuable because it could provide further information regarding the implementation and practical impact of the Executive Orders. Therefore, the information sought had 'at least a modest probability of generating useful new information about a matter of public concern.'" However, because the ACLU had not adequately justified some of its hours, the court reduced its $88,890 fee award request to $76,929. (*American Civil Liberties Union of Arizona v. United States Department of Homeland Security*, Civil Action No. 17-01083-PHX-DJH, U.S. District Court for the District of Arizona, March 27)

A federal court in Florida has ruled that federal prisoner Ramon Lopez **failed to exhaust his administrative remedies** when he failed to appeal the Department of Justice's no records response to his FOIA request to the Bureau of Prisons for a contract. The agency conducted a search but found no records. During the processing of Lopez's request, the agency also told Lopez that responding to his request would cost $75 in fees. Dismissing Lopez's FOIA claim, the court noted that "because the BOP responded to Lopez's request, constructive exhaustion was not available to satisfy the exhaustion requirement. Instead, Lopez was required to accomplish actual exhaustion. Lopez failed to clarify his request or appeal BOP's response to the OIP Director. Moreover, he has not paid the $75.00 fee required to obtain judicial review." (*Ramon Lopez v. United States of America and Federal Bureau of Prisons*, Civil Action No. 18-263-Oc-34PRL, U.S. District Court for the Middle District of Florida, March 27)

A federal court in Illinois has ruled that federal prisoner William Mabie should be sanctioned for his abuse of the judicial system. After a number of incidents involving threats to government employees, the court agreed that Mabie's current suit against the FBI, the Bureau of Prisons, and the Executive Office of U.S. Attorneys should be dismissed. The court pointed out that "Plaintiff used profane, belligerent, and abusive language when speaking to opposing counsel. He leveled unfounded accusations at opposing counsel. He insulted a judge and Court employees and impugned the integrity of judicial proceedings in the federal courts. And then Plaintiff irretrievably crossed any and all bounds of acceptable behavior when he threatened opposing counsel. Such conduct is beyond the pale. It cannot be tolerated and it undoubtedly warrants sanctions. While Plaintiff has not filed a response to Defendant's motion, the Court is quite confident there is nothing he could say that would excuse his statements or insulate him from sanctions." (*William Mabie v. Executive Office for United States Attorneys, et al.*, Civil Action No. 18-1939-MAB, U.S. District Court for the Southern District of Illinois, March 31)

Judge James Boasberg has ruled that CREW, the National Security Archive, and the Society for Historians of American Foreign Relations **failed to state a claim** for relief under the Federal Records Act in their suit against the Department of State for not creating, maintaining and preserving records documenting the Trump administration's conduct of diplomacy. Citing a number of examples, the coalition of public interest groups argued that the State Department purposefully evaded its obligations under the FRA. However, Boasberg, pointing to the **policy or practice** cause of action under FOIA relying on *Payne Enterprises v. USA*, 837 F. 2d 486 (D.C. Cir. 1988) and its progeny, observed that "as currently framed, Plaintiffs' wide-ranging Complaint merely describes Defendants' isolated *violations* of the guidelines governing records creation rather than an agency-wide policy that violates the FRA." He noted that under *Payne* "the allegations of a 'single violation [is] insufficient' and "there must be 'ongoing' persistent violations. Only then could a court justifiably find the existence of an actual policy or practice." He pointed out that "stripped to its core, then the Complaint alleges an Administration-wide recordkeeping failure concerning an aspect of its Ukraine policy. To the extent that a few isolated actions involved some State Department personnel, Plaintiffs cannot transform an allegedly brazen compliance violation into a 'policy or practice' claim simply by slapping the 'policy or practice' label on it." Boasberg indicated that the coalition's second count failed for the same reason – that it did not cite widespread non-compliance. However, Boasberg indicated that "despite the Complaint's defects, the Court does not foreclose the possibility that Plaintiffs might be able to state a claim for relief." He observed that "plaintiffs may thus file an Amended Complaint if they can retool their allegations to avoid the pitfalls discussed herein." (*Citizens for Responsibility and Ethics in Washington, et al. v. Michael R. Pompeo, et al.*, Civil Action No. 19-3324 (JEB), U.S. District Court for the District of Columbia, April 3)

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