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Washington Focus: Sen. Charles Grassley (R-IA), joined three colleagues on the Senate Judiciary Committee – Sen. Patrick Leahy (D-VT), Sen. John Cornyn (R-TX), and Sen. Dianne Feinstein (D-CA) to send a letter to the Department of Justice expressing concern over agencies' decisions to cut back on receiving FOIA requests because of the corona virus pandemic. The letter pointed out that "we understand all agencies and departments are continuing to adapt to the current circumstances, but it is the department's duty to ensure that FOIA administration is not simply cast aside as a temporary inconvenience." The Federal Manager's Daily Report indicated that a recent Congressional Research Service report sampling a dozen agencies confirmed that agencies like Interior, NASA, CDC, NRC, and FDA were recommending that requesters submit requests online while the FBI indicated that it would no longer accept online requests and instructed requesters to submit FOIA requests by mail.

D.C. Circuit Rejects District Court Timing of Non-Acquiescence Decision

The D.C. Circuit has found that even though the district court judge rejected the EPA's claim that it never adopted a policy of non-acquiescence with a ruling in the Eighth Circuit limiting the agency's authority, finding instead that the agency had decided to limit the ruling's coverage only to those states in the Eighth Circuit at the time it decided not to appeal the ruling to the Supreme Court, there is still a factual dispute as to whether a handful of records created before that date are actually pre-decisional for purposes of Exemption 5 (privileges).

The case started with a 2015 FOIA request filed by Hall & Associates, an environmental consulting group that represented utilities, for records concerning the impact of the 2013 Eighth Circuit ruling in *Iowa League of Cities v. EPA*, in which the appeals court found that the EPA had violated the Administrative Procedure Act by failing to go through a notice-and-comment rulemaking process in promulgating regulations on water treatment. While *Iowa League of Cities v. EPA* was binding only on states within the Eighth Circuit, an appeal to the Supreme Court would have resulted in either a rejection of the Eighth Circuit's opinion – essentially vacating the ruling entirely – or an affirmation of its ruling – meaning

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the Eighth Circuit's ruling would apply nationally. However, a second alternative open to the EPA was to not appeal the decision and instead take the position that the Eighth Circuit ruling was limited to those states within the Eighth Circuit. The EPA chose not to appeal to the Supreme Court and treated the case as limited to the Eighth Circuit.

In response to Hall's requests, the EPA took the position that it had never made a decision on non-acquiescence and that any discussions were protected by the deliberative process privilege. Hall took the position that the EPA's decision not to appeal to the Supreme Court constituted a final decision to not acquiesce with the Eighth Circuit's ruling. In her 2018 ruling on the dispute, District Court Judge Ketanji Brown Jackson found that a November 19, 2013 press release by the EPA, referred to as the Desk Statement, made clear that the agency had decided to limit *Iowa League of Cities* to states within the Eighth Circuit and to continue to implement the policies rejected by the Eighth Circuit everywhere else. Having established the time line, Brown Jackson further noted that records created after November 19, 2013 were post-decisional to the agency's final non-acquiesce decision, but that records created before that date were pre-decisional and protected by the deliberative process privilege. Hall appealed Brown Jackson's ruling to the D.C. Circuit, arguing that there was still a dispute over when the EPA made its non-acquiescence decision.

The D.C. Circuit agreed. Writing for the court, Circuit Court Judge Patricia Millett pointed out that "the district court misstepped in this case because it granted summary judgment to the EPA by resolving against Hall that quintessentially factual dispute concerning the date on which the non-acquiescence position was first adopted. Hall's proffered evidence, the EPA's own submissions (including its own *Vaughn* Index and the three [agency] declarations), and our own *in camera* review of the withheld materials offer up a buffet of different dates by which the non-acquiesce decision may have been adopted. Those dates include, but are not confined to, the time of the Desk Statement. The summary judgment record simply does not dictate an answer to that factual question."

Millett noted that "the EPA argued that no decision about acquiescence had *ever* been made, meaning that every document was predecisional. The EPA's *Vaughn* Index insists that the Agency 'has not, to date, decided whether and to what extent to follow the *Iowa League of Cities*' decision outside the Eighth Circuit, saving those questions for permitting or other case-specific contexts.'" She pointed out that "the EPA, in fact, admits that it never took a position in district court that November 19th was the date that it made 'a non-acquiescence determination (because the EPA argues that it *never made* a non-acquiescence decision.)' So not only did no party argue in district court that November 19th was the date of non-acquiescence – both parties argued that it was not. Given that, nothing in the EPA's submissions points to a date certain for when it finally settled on a non-acquiescence position, other than 'not yet.'"

The EPA argued that the record, as a whole, supported the conclusion that a non-acquiescence position was not communicated before November 19, 2013. But, Millett, observed, "this is simply wrong. . . [T]he EPA submitted little or no evidence speaking directly to the timing question, and no direct evidence at all that the date was November 19th. And Hall, for its part has identified sufficient evidence to support a reasonable inference that the EPA reached the non-acquiescence position sometime before November 19th."

Based on statements the EPA made at that time that it might not acquiesce in the Eighth Circuit's decision, Brown Jackson had concluded the statements could be read as nothing more than a restatement of the agency's legal options. Millett was far more skeptical. She noted that "sure, the document *could* be read that way. But it does not have to be. It could just as reasonably be read to support Hall. And it is Hall – not the EPA – who is entitled at this stage to all reasonable inferences from the evidence. When the [EPA's] statement is read in context, and in the light most favorable to Hall, it was just as likely that [the EPA] was referring to ironing out details of the EPA's *implementation* of its non-acquiescence decision, not its *adoption*.

In fact, the EPA included the same sorts of caveats in describing its position three years later, after it had long since settled on not acquiescing. . .Given that, on the summary judgment record before us, it is certainly reasonable to infer that [the agency's] public statement that the non-acquiescence position articulated in the Desk Statement was reached at least a few days earlier."

Sending the case back to the district court for further proceedings, Millett indicated that "we only hold that, applying the summary judgment standard, the EPA has not established as a matter of indisputable fact that the definitive date of non-acquiescence was November 19, 2013. Because the EPA did not meet its burden of demonstrating conclusively that its non-acquiescence determination postdates the creation of all of the still-withheld documents, the district court erred in granting summary judgment to the EPA." (*Hall & Associates v. Environmental Protection Agency*, No. 18-5241, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 21)

Views from the States

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

Nevada

The supreme court has ruled that litigation filed by the Center for Investigative Reporting against the Las Vegas Metropolitan Police Department caused the agency to disclose 1,400 pages of records concerning its investigation of the unsolved 1996 murder of rapper Tupac Shakur after the agency initially told CIR that because the Shakur murder investigation was still open the records were exempt because they were part of an ongoing investigation. After CIR threatened to file suit, LVMPD disclosed a two-page police report. CIR then filed suit. The trial court gave LVMPD two options – either to produce redacted records or to participate in an *in camera* court hearing. The agency opted for the court hearing, but before the scheduled hearing, LVMPD and CIR came to an agreement by which the agency would provide redacted records with an explanatory index. That process resulted in disclosure of 1,400 records. The trial court dismissed the case as moot but agreed that CIR was the prevailing party and could file for attorney's fees under the Nevada Public Records Act. LVMPD argued that it was immune from damages for withholding records in good faith. The trial court disagreed and awarded CIR attorney's fees and costs. CIR argued at the supreme court that it had prevailed based on the catalyst theory – that its suit caused the agency to disclose records. Noting that the New Jersey Supreme Court had adopted the catalyst theory because it promoted open government, the Nevada Supreme Court adopted it as well. The supreme court pointed out that "we therefore hold that a requester is entitled to attorney fees and costs under [the NPRA] absent a district court order compelling production when the requester can demonstrate 'a causal nexus between the litigation and the voluntary disclosure or change in position by the Government.'" The supreme court agreed that "the record thus supports the conclusion that the litigation triggered LVMPD's release of the documents. LVMPD does not proffer any other reason aside from the litigation that it voluntarily turned over the requested documents." (*Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc.*, No. 77617, Nevada Supreme Court, Apr. 2)

The supreme court has ruled that the trial court did not abuse its discretion when it awarded the Las Vegas *Review-Journal* and the Associated Press $31,873 in attorney's fees for its litigation against the Clark County Office of the Coroner /Medical Examiner for its requests submitted under the Nevada Public Records Act for records of autopsy reports for victims of the mass shooting at the Route 91 Harvest Country Music

Festival in October 2017. The trial court ordered the Coroner's Office to disclose the autopsy reports and found that the Coroner's Office's delay did not constitute bad faith. However, the trial court awarded the media plaintiffs $31, 873 after finding they had substantially prevailed. The Coroner's Office appealed the award to the supreme court, arguing that it was not liable for damages because it acted in good faith. The supreme court found that the Coroner's Office had signed a stipulation to settle the suit that allowed the plaintiffs to request attorney's fees. Noting that it had recently rejected the argument by the Coroner's Office that it was immune from damages in a related case, the supreme court reached the same conclusion here. (*Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal and the Associated Press*, No. 76436, Nevada Supreme Court, Mar. 25)

The supreme court has ruled that the Division of Parole and Probation properly withheld records from prisoner Wesley Ernest Goetz pertaining to his lifetime supervision under the Nevada Public Records Act. The supreme court pointed out that "we conclude that the district court did not err in finding NRS 213.1075 exempts the Division's records from NPRA." The supreme court indicated that Goetz was not entitled to the records, noting that "NRS 179A.150 entitles the person who is the subject of the criminal record to access the information contained in that record. Thus, NRS 179A.100(4)(a) provides for the disclosure of the Division's records to Goetz if they are records of criminal history. A 'record of criminal history' includes 'information contained in records collected and maintained by agencies of criminal justice. . .concerning the status of an offence on parole or probation or concerning a convicted person who has registered. . .' Goetz has failed to demonstrate that the records he seeks are records of criminal history because lifetime supervision is not equivalent to parole and probation for purposes of records disclosure." (*Wesley Ernst Goetz v. Nevada Division of Parole and Probation*, No. 76181, Nevada Supreme Court, Mar. 24)

The Federal Courts…

Like two other district court judges who faulted both the General Services Administration and OMB for their failure to **conduct adequate searches** for records concerning the decision on the FBI Consolidation Project, Judge Colleen Kollar-Kotelly has ruled that searches by GSA, OMB, and the Department of Justice for records in response to requests from American Oversight also fell short because the agency either failed to include obvious search terms or failed to search email accounts of staffers likely to have responsive records. In response to American Oversight's requests, GSA located 52 responsive pages, released 23 pages with redactions and withheld 29 pages entirely under **Exemption 5 (privileges)**. OMB located 19 responsive pages and withheld them entirely under Exemption 5. The FBI located 38 pages, released 10 pages in full,7 pages in part, and withheld 21 pages entirely under Exemption 5. The Department of Justice located six pages and released one page in full. American Oversight challenged the agencies' searches and their use of Exemption 5. American Oversight faulted GSA's decision to search records using exclusively email addresses. Kollar-Kotelly agreed that using email addresses only improperly limited the agency's search. She noted that "given the breadth of Plaintiff's request, and lacking justification from Defendant GSA, the Court finds that the decision to link all search terms with email addresses unreasonably excluded other, non-email records." DOJ decided to search only the email account of then Deputy Attorney General Rod Rosenstein because he was DOJ's point person at the meetings referenced in American Oversight's requests. Kollar-Kotelly agreed with American Oversight that once DOJ found that two other DOJ officials worked with Rosenstein on preparing for the meeting it should have searched their records as well. She observed that "even if Mr. Rosenstein was the sole attendant of meeting, the disclosed email makes clear that he did not work alone in preparing for the meeting and may not have worked alone in the meeting's follow-up." OMB declined to use terms like the "Hoover Building" and "JEH," claiming those terms were not commonly used by OMB. She noted that "by omitting obvious synonyms, Defendant OMB's search was not reasonably

calculated to produce all responsive records." American Oversight also challenged the FBI's search because it failed to use terms like the "Hoover Building" and "JEH," arguing they were too broad and would result in too many non-responsive hits. Kollar-Kotelly noted that the FBI could have refined its request. She pointed out that "insofar as the searches would produce a plethora of unresponsive documents, Defendant FBI failed to consider whether the terms could be combined with restrictions such as a narrowed timeframe or other search terms such as 'relocation' or 'consolidation' in order to lessen the number of unresponsive documents." American Oversight also faulted the FBI for searching only Director Christopher Wray's email account rather than paper records. Kollar-Kotelly pointed out that "as Director Wray was in attendance at these meetings it is reasonable to think that he might have notes, handouts, or other material that are in paper form and not electronically stored. Lacking adequate explanation, it was not reasonable for Defendant FBI to fail to search Director Wray's paper records." (*American Oversight v. U.S. General Services Administration, et al.*, Civil Action No. 18-2419 (CKK), U.S. District Court for the District of Columbia, Apr. 20)

Judge Randolph Moss has resolved the last two remaining issues left in litigation brought by George Canning for records relating to a 2010 memorandum from President Obama to his foreign policy advisors, entitled Presidential Study Directive 11, and records concerning the Muslim Brotherhood. In his previous opinion, Moss had found that the State Department had not explained why records were reclassified after Canning's FOIA request had been received, and whether drafts of a letter from Obama to King Abdullah of Saudi Arabia were protected by **Exemption 5 (deliberative process privilege)** or whether they constituted the final version of the letter. This time, however, Moss agreed that the agency had sufficiently explained why the records were exempt. Canning's argument on the reclassification issue was that under the agency's classification regulations the Under Secretary of Management was required to authorize any reclassification decision and that appeared here not to have been the case. But Moss observed that "the Department has now submitted a declaration attesting that, during the relevant timeframe, 'the Department had no Under Secretary for Management' and that the 'Deputy Under Secretary for Management exercised all of the authorities of that office "pursuant to a delegation of authority."'" Moss indicated that "at this issue is no longer in dispute – and thus the Court has no occasion to pass on the adequacy of the delegation of this authority to the Deputy Under Secretary under the circumstances – the Court will grant summary judgment in favor of the State Department with respect to the Exemption 1 withholding." In his previous opinion, Moss had found that State had not adequately explained whether or not Obama had relied on the two Arabic translations of the draft letter in formulating any further response. Compounding the problem, State confessed that it had no record of whether or not Obama actually sent a letter to King Abdullah. Canning attacked the idea that Obama could have gotten much deliberative use of two letters in Arabic. Moss disagreed, noting that "disclosure of these drafts, which could easily be translated back into English, would undermine the interest in unfettered decisionmaking protected by the deliberative process privilege. . .Requiring disclosure of translations of otherwise privileged documents would undermine the ability of government officials to engage in frank discussions, no less than disclosure of the English-language version of the same documents." He added that "diplomatic communications are often nuanced, moreover, where minor changes between drafts can carry significant import and where those asked to prepare drafts for review by more senior officials may worry that disclosure of drafts not yet signed by the principal could have significant foreign affairs consequences. When dealing with a presidential communication with a foreign head of state, those concerns are at their zenith." Moss indicated that "because the Department does not know whether the letter was ever sent, and, if it was sent, the Department does not know whether the final version is identical to the drafts. Requiring disclosure based on the lack of knowledge would have the precise chilling effect on the 'uninhibited' exchange of views and recommendations that the deliberative process privilege is designed to protect." (*George Canning, et al. v. United States Department of State*, Civil Action No. 13-831 (RDM), U.S. District Court for the District of Columbia, Apr 8)

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A federal court in Illinois has ruled that U.S. Immigration and Customs Enforcement failed to justify many of its withholdings under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a request from Jacqueline Stevens, a political science professor at Northwestern, for records pertaining to the agency's Detainee Volunteer Wages program. Stevens challenged the **adequacy of the agency's search** as well as redactions made under Exemption 5. While the court found that the agency had conducted an adequate search and had properly claimed attorney-client privilege for four documents, it agreed with Stevens that many of the agency's claims that the deliberative process privilege covered messaging communications – how to respond to public or legislative queries about policies – were not deliberative. While a number of recent decisions from district court judges in the D.C. Circuit have recognized that such discussions are deliberative, district court judges in the Second Circuit have dismissed such claims as being nothing more than a restatement of already decided policies. Here, Judge Harry Leinenweber, distinguishing between instances in which such discussions included a give-and-take consultative process and those in which the messaging merely explained already existing policies, sided with the Second Circuit's position. Rejecting one instance of the agency's messaging claims, he pointed out that "ICE does not exercise its essential policymaking role when it coordinates who from the agency should respond to an outside inquiry and what they should say consistent with and in defense of existing agency policies. In fact, ICE's document descriptions show no evidence of policymaking." Turning to another example, Leinenweber noted that "ICE's *Vaughn* index descriptions and accompanying declarations do not demonstrate that these communications relate to anything other than rationalizing the agency's final decisions. Thus, disclosure would not reveal the deliberative process behind not-yet-finalized policy decisions." ICE withheld personally identifying information under both Exemption 6 and Exemption 7(C). Rejecting the application of both exemptions, Leinenweber observed that "ICE overstates the authority supporting these redactions [under Exemption 6] and fails to cite any case binding on this court relevant to these circumstances." As to Exemption 7(C), he noted that "while the topics addressed in the documents pertain to law enforcement, in a general sense, the documents are not investigatory. Thus, they were not 'compiled for law enforcement purposes.' ICE must disclose the redacted names of the other federal employees on the emails." (*Jacqueline Stevens v. United States Department of Homeland Security, et al.*, Civil Action No. 14-3305, U.S. District Court for the Northern District of Illinois, Apr. 8)

Judge Tanya Chutkan has ruled that the agencies that received journalist Jeffrey Stein's series of requests for records about security concerns surrounding security briefings given to Donald Trump while he was a candidate and another series of requests about background investigations for 15 potential Trump administration appointees properly responded to Stein's requests although she concluded that records about the existence of background investigations did not qualify for protection under **Exemption 6 (invasion of privacy)**. Three agencies – the CIA, the FBI, and the Office of the National Director of Intelligence – produced some records in response to Stein's security concerns requests. The same three agencies also provided some records in response to Stein's requests for records on 15 potential appointees. Grouping her analysis by agency, Chutkan found that the CIA had provided a sufficient explanation of its search and appropriately described those records it withheld in response to Stein's investigation requests. But she agreed with Stein that disclosure of the names of those investigated were not protected by Exemption 6. Although she found little public interest in disclosure of names, she indicated that "revealing the identities of public officials receiving security clearance investigations, unlike the identities of subjects of criminal investigations, would not 'subject those identified to embarrassment and potentially more serious reputational harm.'" Although Stein argued that the FBI had interpreted his requests too narrowly, Chutkan found the agency disagreed. Instead, she noted that the plain meaning of 'copies of all records, including emails, about any *steps taken* to investigate or authorize (or discussions about potentially investigating or authorizing [an individual] for access to classified information' reasonably encompasses information about the FBI's investigatory process. It does not extend to the data or results of the investigations. If Stein intended for his

request to cover such information, he should have made a specific request; FBI's interpretation was not unreasonably merely because the agency declined to look beyond the text and construe the requests as broadly as Stein would like." However, she rejected the agency's claim that it had no records of investigation reports for either Ivanka Trump or Michael Flynn. Stein had provided two media reports indicating that investigations of Trump and Flynn had been conducted. Siding with Stein, Chutkan indicated that "Stein's argument is considerably more credible than a 'purely speculative claim about the existence of records and discoverability of other documents.' He casts enough doubt on the presumption of good faith accorded to the FBI's declaration to preclude summary judgment for the FBI as to these two requests, and the court will therefore direct FBI to submit an additional declaration explaining its search methodology for the two requests." Chutkan noted that OMB had properly interpreted the scope of Stein's investigation requests but found that identifying information was not protected by either Exemption 6 or **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Although she indicated that the balance of interests favored OPM's decision to withhold the records, she ordered OPM to "submit a supplemental declaration to more fully explain why the requested information is exempt under Exemption 6 and/or Exemption 7(C)." Chutkan found that ODNI had properly invoked Exemption 6 to withhold identifying information because Stein had failed to articulate a public interest in disclosure. She pointed out that "here, the public has no overriding interest in disclosure with respect to ODNI. Because ODNI was not involved in conducting background investigations, it took no investigative 'steps' that the records could reveal." (*Jeffrey Stein v. Central Intelligence Agency, et al.*, Civil Action No.17-0189 (TSC), U.S. District Court for the District of Columbia, Apr. 14)

A federal court in Connecticut has ruled that the Department of Defense properly redacted identifying information under **Exemption 6 (invasion of privacy)** for records concerning bioassay data tests taken from crew members as a result of a 1966 crash of a U.S. B-52 armed with nuclear weapons with a KC-135 fuel tanker during midair refueling over Palomares, Spain. In response to three requests from Anthony Maloni, a Vietnam vet, the agency disclosed some records but refused to provide a list of service members from whom DOD had collected bioassay data pertaining to their plutonium exposure. The court agreed that the information qualified as similar files under Exemption 6 and that it contained intimate details of individuals. Maloni argued that Exemption 6 no longer applied to those crew members who were deceased. The court pointed out that the survivors of deceased crew members still had some privacy interest in the records, noting that "the public interest favoring disclosure here is not more than minimal, so even if the privacy interests of deceased veterans and their survivors are, in fact, diminished ones, they nonetheless suffice to outweigh any public interest that could properly be considered here." The court rejected Maloni's claim that disclosure of the names would shed light on government operations or activities. Instead, the court noted that "the government has disclosed the information about the Palomares nuclear accident with the exception of the names of the veterans who were present there. Unredacting the names will not provide any additional information as to the extent of the harm caused by the radiation exposure other than identifying the individuals who were harmed." (*Vietnam Veterans of America, et al. v. Department of Defense*, Civil Action No. 17-1660 (AWT), U.S. District Court for the District of Connecticut, Apr. 8)

Judge Timothy Kelly has ruled that the CIA **conducted an adequate search** for records pertaining to the agency's alleged investigation of Dan Hardway, Edwin Lopez, and Robert Blakey, staffers on the House Select Committee on Assassinations from 1976-1979. The agency ultimately disclosed two records – non-disclosure agreements signed by Blakey during his work at the HSCA. The court had previously found that the CIA had not adequately explained its search of the Directorate of Operations. Kelly indicated that the new declarations submitted by the CIA were sufficient in that regard. He noted that "the CIA searched nonoperational records in the Directorate of Operations in substantially the same way it searched for

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operational records. For both operational and nonoperational records about Plaintiffs, the CIA queried its database with variations on the Plaintiffs' names, standing alone and close to 'HSCA' or 'House Select Committee on Assassinations,' and for any other potentially responsive nonoperational records, it also queried the database with the name Gaeton Fonzi, [who had been referenced in several subparts of the plaintiffs' FOIA request], as well as the terms 'HSCA' and 'House Select Committee on Assassinations.' [The agency's affidavit] explains that because these terms would identify all extant references to Plaintiffs and Fonzi, the CIA's search cast a broader net than Plaintiffs' request, and any documents responsive to their request within the Directorate of Operations would have been captured in this search." Hardway argued that statement suggested bad faith because the CIA had previously said it did not search operational files on Fonzi. Kelly found no contradiction in the agency's explanation. He noted that "that the two sets of files are in the same database does not imply that the CIA must have searched operational files when querying the database for records pertaining to Fonzi. Indeed, in its prior opinion, the Court expressed that the two sets of files may have been housed together." Hardway also argued that the CIA should have searched its JFK Assassination Collection at the National Archives. Rejecting the claim, Kelly observed that "plaintiffs identify no legal basis to require CIA to search responsive documents in NARA's JFK Collection. Indeed, an agency need only search its *own* records in response to a FOIA request." Kelly also rejected Hardway's claim that the agency's historic misconduct was relevant to their FOIA request. He pointed out that "plaintiffs cite no authority for the proposition that decades-old alleged agency misconduct can serve to negate the presumption of good faith afforded that agency in a FOIA proceeding simply because the alleged misconduct is the subject matter of the FOIA request at issue." (*Dan Hardway, et al. v. Central Intelligence Agency*, Civil Action No. 17-1433 (TJK), U.S. District Court for the District of Columbia, Apr. 18)

A federal court in California has ruled that NPR reporter Eric Westervelt's request to the Department of Veterans Affairs for records concerning the agency's Office of Accountability and Whistleblower Protection, specifically including records that reference Leslie Wiggins, encompasses a search of Wiggins' email account. Ruling in favor of Westervelt on the scope of his request, the court noted that "liberally construed, Plaintiffs' request calls for responsive documents that include records from Ms. Wiggins's own email account. The request logically pertains to the VA as a whole rather than just to OAWP, for as the Plaintiffs point out, only the first and second parts of the request are limited to OAWP records; the third and fourth contain no such limitation." The VA argued that broadening the scope of the request would require a search of the email accounts of every employee who might have had contact with Wiggins. But the court pointed out that "plaintiffs do not seek an order directing the VA to search the records of every employee for responsive documents. Instead, they ask for an order directing the VA to search Wiggins's own emails for responsive records. The VA does not contend that expanding the search to include Wiggins's email account would be unduly burdensome." Although the majority of the 6,498 pages already released by the VA under a production order of 2,000 pages a month, were blank or indecipherable, the court found that because the VA had met its production schedule so far there was no reason to increase the monthly production rate. (*National Public Radio, Inc., et al. v. United States Department of Veterans Affairs*, Civil Action No. 18-05772-DMR, U.S. District Court for the Northern District of California, Apr. 13)

The D.C. Circuit has upheld the district court's conclusion that FD-302s prepared by the FBI to summarize its interviews with former President Barack Obama, Valerie Jarrett, and Rahm Emanuel during the Justice Department's investigation of then-Illinois Governor Rod Blagojevich for trying to profit financially from filling the Senate seat vacated by President Obama were protected under **Exemption 5 (attorney work product privilege)**. The D.C. Circuit pointed out that "all three interviews took place in December 2008, the month of Blagojevich's arrest, and were undertaken 'for the purpose of gathering evidence that could be presented to a grand jury and that could factor into the case to be presented at the trial.' The interviews 'were

conducted at the direction of the career DOJ prosecutors assigned,' and prosecutors participated in determining the investigative strategy for each interview and in questioning the witnesses." (*Judicial Watch, Inc. v. United States Department of Justice*, No. 19-5218, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 17)

A federal court in California has ruled that the U.S. Patent & Trademark Office properly responded to a FOIA request from LegalForce RAPC Worldwide seeking records on the agency's investigation into Heather Sapp, one of the company's attorneys and a former PTO attorney, for possible violation of the agency's document signing and submission rules. The investigation was concluded with a settlement and public reprimand. LegalForce submitted a four-part request for records pertaining to the investigation of Sapp. The agency search located 3,109 pages, disclosed 31 pages in full and withheld 3,078 pages in full under **Exemption 5 (privileges)**, **Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency conducted a second search and found an additional 170 pages, disclosing 83 pages and withholding 75 pages in full. The agency also reconsidered its original withholding decisions and released 143 pages, in full and 575 pages in part. After reviewing withheld documents *in camera* the court found that some records withheld under the attorney work product privilege did not qualify for the privilege. The court noted that "a document, otherwise discoverable, does not become undiscoverable merely because an attorney has reviewed it." The court added that "recall, the exemption covers *agency generated* documents – it doesn't cover non-agency authored documents. [The disputed document] contains no agency generated material. Instead, it contains email threads between Ms. Sapp and [PTO attorney] Mr. Abhyanker – plaintiff's own email records – and a memorandum from outside ethics counsel." Although under the circumstances of such a request, one would think that Sapp had provided a privacy waiver to her employer to resolve the privacy exemption issue, the court indicated that the agency claimed that disclosure of records identifying Sapp were "clearly an unwarranted invasion of Ms. Sapp's personal privacy generally and an unwarranted invasion of her personal privacy interest in law enforcement documents involving her. Despite the fair opportunity to challenge these grounds in its opposition brief, plaintiff did not. No public interest articulated to overcome Ms. Sapp's privacy interest, [the disputed document] was appropriately withheld under Exemption 6 and Exemption 7(C)." (*LegalForce RAPC Worldwide P.C. v. United States Patent & Trademark Office*, Civil Action No. 19-05935 WHA, U.S. District Court for the Northern District of California, Apr. 16)

A federal court in New York has adopted a magistrate judge's recommendation in a FOIA case brought by Joseph Rutigliano for a prosecution declination memorandum filed by the U.S. Attorney for the Eastern District of New York that portions of the PDM are protected by **Exemption 5 (privileges)**. Rutigliano had been convicted in the Southern District of New York of defrauding the U.S. Railroad Retirement Board of tens of millions of dollars in occupational disability pensions for retired Long Island Railroad workers. But before he was convicted by the USAO for the Southern District of New York, the USAO for the Eastern District of New York decided not to prosecute the case and prepared a memorandum explaining that decision. Rutigliano requested the PDM, believing it provided information that would exonerate him. After Rutigliano filed suit, a magistrate judge recommended that the PDM be withheld under the attorney work product privilege and the deliberative process privilege. Rutigliano argued that testimony given by Martin Dickman, the Retirement Board's Inspector General before the House of Representative in 2018 underscored the public interest in disclosing the information about his PDM. But the court noted that "even under this standard, the Court determines that the Plaintiff's objections are without merit. The Court's failure to review Dickman's testimony or to weigh the Plaintiff's interest in overturning his conviction were in no way relevant to whether the materials in the PDM fell under the protections of Exemption 5." The district court judge approved of the

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decision by Magistrate Judge Arlene Lindsay not to conduct an in *camera* of the PDM. The district court pointed out that "the decision not to impose *in camera* review to a document in a FOIA action is within the discretion of the district court, and the Court here sees no reason to depart from Judge Lindsay's assessment of the PDM." (*Joseph Rutigliano v. U.S. Department of Justice*, Civil Action No. 17-6360 (ADS) (ARL), U.S. District Court for the Eastern District of New York, Apr. 20)

The D.C. Circuit has joined the First Circuit in ruling that suits brought by coalitions of scientists challenging the 2017 EPA decision to prohibit scientists receiving agency grants from serving on agency advisory boards subject to the **Federal Advisory Committee Act**, may continue because they allege that the policy violated the arbitrary and capricious standard under the **Administrative Procedure Act**. While the First Circuit specifically indicated that its ruling was based on the plaintiffs' showing that the policy violated the fair and balanced representation requirement in FACA, the D.C. Circuit found the agency had failed to provide a reasoned explanation of its policy change as required under the APA. Here, the D.C. Circuit noted that "nothing prevents EPA from developing an appointment policy that excludes individuals it previously allowed to serve. To do so, however, EPA must explain the basis for its decision. Because the Directive contains no discussion of [the Office of Government Ethics'] or EPA's prior conclusions at all, the Directive 'crossed the line from tolerably terse to intolerably mute.'" (*Physicians for Social Responsibility, et al. v. Andrew Wheeler*, No. 19-5104, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 21)

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