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Washington Focus: Senators Chris Murphy (D. CT) and Ron Wyden (D-OR) recently introduced the Transparency in Classification Act (S. 932) designed to clarify that documents critical to public decision-making are subject to being challenged to ensure they are classified only for national security reasons and not to hide embarrassing information from the public. In a press release announcing the legislation, Murphy indicated that "overclassification for political purposes undermines Congress's ability to hold the executive branch accountable and unnecessarily keeps the American public in the dark. Regardless of the administration, protecting the integrity of the classification system is a matter of national security – not politics."

Court Finds Agency's Search Adequate While Faulting Exemption Claims

Ruling in a suit brought by Paul Kilmer for records reflecting why individuals attempting to cross the border from Canada to travel to the Women's March on Washington held January 21, 2017, were stopped by Customs and Border Protection agents, Judge Colleen Kollar-Kotelly discussed the obligation of an agency to not only conduct an adequate search for records in response to a FOIA request, but also to sufficiently explain via agency affidavits the reasons for determining the parameters of the search.

Kilmer, who participated himself in the January 17 rally, submitted his FOIA request after the media reported that Canadian citizens were stopped at the border and turned back if they indicated they intended to participate in the Women's March. In response to Kilmer's request, the agency told him that after conducting a comprehensive records search, the agency found no responsive records. Kilmer then filed two administrative appeals to the agency, which went unanswered. However, after Kilmer filed suit, the agency conducted additional searches and located 937 pages responsive to Kilmer's multi-part request. The agency redacted records under Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law

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enforcement records), and Exemption 7(E) (investigative methods or techniques). At this point, Kilmer focused on challenging the adequacy of the agency's search.

Addressing the agency's search, Kollar-Kotelly noted that CBP's FOIA Appeals Officer Shari Suzuki had overseen the agency's search. Suzuki had referred portions of Kilmer's request to six separate offices at CBP: (1) the Office of Congressional Affairs, (2) the Office of Public affairs, (3) the Intergovernmental Public Liaison Office, (4) the Office of the Commissioner, (5) the Policy Directorate, and (6) the Office of Field Operations. OCA searched using terms such as "women's march," "women," and "inauguration." The searched yield three responsive records. At the OPA, the Director of Media searched for records involving media engagement. That search yielded no responsive records. The Office of Field Operations includes 20 field offices. CBP searched many of them, particularly those near the Canadian border. Most of those searches yielded no records, but a search of the Buffalo Office found 612 pages of emails and attachments.

In responding to Kilmer's multi-part request, CBP conducted separate searches pertaining to various portions of the request. The agency had developed a spreadsheet containing 230 lines, which the agency narrowed down with Kilmer's help. It then was able to locate 186 responsive pages, as well as winnowing down a potential 1228 pages to 76 responsive pages. Another search yielded 653 pages of records related to the agency's social media posts from a request for information from the House and Senate Appropriations Committee staff on news reports of individuals denied entry from Canada.

Having reviewed the detailed description of CBP's multiple searches, Kollar-Kotelly indicated that she found the agency had shown that it searches were adequate. She pointed out that "the detailed declaration provided by the CBP's Chief of FOIA Appeals demonstrates the agency's fulsome response to each of Plaintiff's six categories of records. In response to those requests, CBP conducted multiple searches of its relevant electronic databases, which collect and store the agency's information related to individuals deemed inadmissible at the border. CBP has explained the scope and contents of the databases searched and may rely on such 'authoritative' agency databases as part of a reasonable search for responsive records."

Kollar-Kotelly pointed out that the 'reasonableness' of CBP's FOIA search 'is necessarily "dependent upon the circumstances of the case."' And here, the 'circumstances of the case' include the realities of coordinating a document search across a large executive agency like CBP, which includes 60,000 employees over numerous offices and regions. Accounting for this disparate reach, CBP's search methodology in this case broadly employed the assistance of various agency components. Suzuki plausibly explains why CBP selected these components as likely sources of responsive records, based on both their *geographic* relevance and *subject-matter* relevance to Plaintiff's six-part FOIA request. The comprehensive, agency-wide approach further demonstrates the overall 'reasonableness' of CBP's FOIA search in this case."

Kilmer argued that the fact the agency initially told him that it had no records inferred that the search was not adequate. However, Kollar-Kotelly noted that "the fact that CBP supplemented its initial search and subsequently retrieved additional responsive documents does not necessarily evince bad faith on behalf of the agency." She added that "as such, the Court declines to find bad faith or draw inferences against CBP here, based upon the agency's initial inability to locate responsive documents, which it later identified and produced to Plaintiff."

Kollar-Kotelly faulted the agency for its failure to sufficiently explain its exemption claims. She observed that "CBP's categorical justifications for its FOIA withholdings fail to facilitate a 'meaningful review' of its claimed FOIA exemptions. Because CBP provides only broad categorical explanations for its claimed FOIA exemptions, the Court is unable to clearly discern which of the agency's justifications apply to any of the various redactions made. This approach is contrary to the agency's obligation to 'provide a

relatively detailed justification, specifically identify the reasons why a particular exemption is relevant, and correlate those claims with the particular part of a withheld document to which they apply.'" To rectify the problem, Kollar-Kotelly ordered the agency to supplement its affidavits. (*Paul F. Kilmer v. U.S. Customs and Border Protection*, Civil Action No. 17-1566 (CKK), U.S. District Court for the District of Columbia, May 14)

Views from the States…

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

Michigan

A court of appeals has ruled that the Traverse City Board of Education cannot rely on the closed meeting provisions of the Open Meetings Act to withhold a document containing complaints about then superintendent Ann Cardon, which was part of a closed session requested by Cardon to respond to the complaints. Shortly after Cardon was hired, various complaints arose against her. To discuss those complaints, the school board convened a meeting and Cardon requested that the meeting be closed under the OMA. At the meeting, a document created by school board chair Sue Kelly, known as the Kelly document, containing the complaints was discussed. No formal decision was reached at the closed session. However, soon after the meeting Cardon and the school board agreed that she would resign. Afterwards, the board held an open meeting and moved to name Jim Pavelka as the interim superintendent. In a subsequent open meeting, the school board formally ratified Pavelka's contract. The Traverse City *Record-Eagle* filed a FOIA request for the Kelly Document. The school refused to provide the Kelly document, arguing it was exempt. The newspaper filed suit, alleging violations of both the FOIA and the OMA. The trial court ruled in favor of the newspaper on the FOIA allegation but found the paper had failed to state a claim under the OMA. Reviewing the relevant case law, the appeals court indicated that "although minutes and transcripts of a closed session are exempt from disclosure, various documents that may be relevant to or relied upon in the same are *not* necessarily exempt. In other words, the exact discussions and deliberations of those involved with a closed session are exempt; however, documents, such as personnel files, settlement agreements, and performance evaluations, that are brought into the closed session are disclosable where no individualized exemption exists for the same. The Kelly document was one such document." The newspaper also argued that the hiring of Pavelka was discussed in closed session. But the appeals court rejected that allegation, noting that "plaintiff offered no authority. . . to show that the *quality* or *length* of deliberations was deficient for purposes of the OMA. The OMA merely requires that decisions and deliberations be made in an open meeting; it does not require that any specific *type* of deliberations take place. . .Although plaintiff may be unhappy with the short length of the deliberations by defendants, plaintiff points to no authority to show this was improper." (*Traverse City Record-Eagle v. Traverse City Area Public Schools Board of Education and M. Sue Kelly*, No. 354586, Michigan Court of Appeals, May 13)

Vermont

The supreme court has ruled that emails sent by retired professor Naomi Fukagawa of the University of Vermont (UVM) Lerner College of Medicine concerning her work as an editor for two academic journals are not subject to disclosure under the Public Records Act because they do not concern public business. Fukagawa served as an editor of two peer-reviewed academic journals – Nutrition Review and the American Journal of Clinical Nutrition. She also served on two advisory committees associated with the U.S.

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government and the University of Illinois at Urbana-Champaign. Although neither of the journals were affiliated with UVM, before and after her retirement, Fukagawa used her UVM email account to correspond with individuals associated with the journals and committees. The emails were requested by USRTK, which argued that because UVM allowed Fukagawa to use her university email account to correspond with the journals and committees, they constituted public records. UVM located 10,140 potentially responsive emails but declined to disclose any of them, arguing they were "almost exclusively related" to Fukagawa's editorial roles on the journals and that they did not relate to public business. The trial court sided with the university and USRTK appealed to the supreme court. The supreme court agreed, noting that "it is undisputed that the emails relate to Dr. Fukagawa's work on the journals and committees, not her work at UVM or other UVM-related matters. Therefore, the content of the emails does not relate to government business. The content reflects the personal endeavors of a government employee." USRTK argued that Fukagawa's outside academic work benefitted UVM and was encouraged by the university. The supreme court rejected that claim, pointing out that "we do not doubt that UVM derives considerable benefits from the external work at issue here and that it spends public funds leveraging these benefits. But these emails concern the private workings of entities unaffiliated with UVM and thus 'shed no light on how the government is conducting its business or spending taxpayer money.'" (*U.S. Right to Know v. University of Vermont*, No. 2020-110, Vermont Supreme Court, May 14)

The Federal Courts…

A federal court in California has rejected most of the exemption claims made by the Farm Service Agency under **Exemption 3 (other statutes), Exemption 4 (commercial and confidential)**, and **Exemption 6 (invasion of privacy)** in response to FOIA requests submitted by five public interest groups – the Public Justice Foundation, the Animal Rights Legal Defense Fund, the Center for Biological Diversity, the Center for Food Safety, and Food & Water Watch – for records concerning applications to its farm loan program and information pertinent to those applications. In its claim for withholding records under Exemption 3, the agency pointed to 7 U.S.C. § 8791 of the Food, Conservation, and Energy Act, which allows the agency to withhold information provided by farmers concerning their agricultural operations, practices or the land itself submitted in order to participate in such programs, with exceptions for the disclosure of payment information and the identify of payees, the disclosure of aggregated non-identifiable information, and the disclosure of identifying information with consent. The agency argued that without consent from the farmers none of the information was disclosable. In response, the public interest groups argued that any information that identified payment information should be disclosed. After reviewing the legislative history of § 8791, which he found unhelpful, Judge William Alsup largely sided with the public interest groups. He noted that ""no decisions, moreover, specifically analyze the applicability of the term 'payment information' on loans or loan guarantees or whether information steps removed from the payments themselves are properly disclosed as 'payment information.'" He indicated that "so this order will apply common sense. Names, addresses, amounts, and dates are crucial context to follow taxpayers' money, which seems to be the point of the 'payment information' exception. Therefore, the agency must turn over all documents necessary to disclose the names and addresses of all recipients of the loan funds in question as well as dollar amounts, and dates paid by the agency to the recipient." Alsup then observed that "a closer call arises when the payment is earmarked by the agency for a specific purpose. Must that limitation be disclosed?" Alsup noted that when farmers applied for funds, no circumscriptions were included. But he pointed out, that "if, however, the agency itself limits or circumscribes use of the payment to a specific purpose as specified in the application, then that specific passage in the application is disclosable under Section 8791." Turning to Exemption 4, Alsup found the agency had failed to show it had provided assurances of confidentiality to the loan applicants. He pointed out that "the application's statement that it 'may' disclose the information to 'government agencies' and

nongovernmental entities that have authorized access' is not an assurance of confidentiality. It seems quite the opposite: a warning that under some circumstances, information will be disclosed." The agency argued that the court should analogize the situation here with the Supreme Court's finding of implicit assurances of confidentiality that it recognized in the context of Exemption 7(D) (confidential sources) in *Dept of Justice v. Landano*, 508 U.S. 165 (1993). Alsup rejected the *Landano* analogy, noting that "this order declines FSA's suggestion to import *Landano*,'s considerations of 'general circumstances' that imply confidentiality in the law enforcement context to enlarge Exemption 4 in the commercial context. Exemption 4 does not permit FSA to withhold loan application information or payment information related to loans because, here, no confidentiality assurance was provided." Alsup also found that Exemption 6 did not apply. He observed that "there is a substantially weighty public interest in administration of FSA programs that disburse taxpayer dollars. The public cannot understand the loan program without knowing loan payment amounts, names and addresses of recipients, and earmarks for those federal funds." (*Public Justice Foundation, et al. v. Farm Service Agency*, Civil Action No. 20-01103 WHA, U.S. District Court for the Northern District of California, May 10)

The D.C. Circuit has ruled that the U.S. Geological Survey failed to show that studies on the effect of asphalt on drinking water are protected by **Exemption 5 (privileges)**. The case involved a request by the Pavement Coatings Technology Council, a trade association for producers of refined coal tar-based sealant, which prolongs the life of asphalt, for records on studies USGS conducted on the increase of polycyclic aromatic hydrocarbons (PAH) in sediment from urban lakes. The studies consisted of 200 model runs from which USGS chose four models as representative. A part of the study included collecting data from volunteer participants in 23 neighborhoods in Austin, Texas. In response to PCTC's FOIA request, USGS disclosed more than 52,000 pages of responsive records. But it withheld the 196 model runs under Exemption 5 because the release of the exploratory analysis "would inhibit the ability to freely explore and analyze data without concern for external criticism." Writing for the D.C. Circuit, Circuit Court Judge Robert Wilkins found the agency had failed to show that the urban lake study was either pre-decisional or deliberative. He pointed out that the "agency first failed to introduce any evidence establishing what role the requested model runs played in the decision to publish the urban lakes study. Second, we find no evidence on this record that disclosing the model runs would expose the Survey's decision-making process 'in such a way as to discourage candid discussion within the agency and thereby undermines the agency's ability to perform its function.'" He explained that "USGS conflates the deliberative process of *coming to a reliable scientific result* with the approving officials' *decision to publish* the urban lakes study. The Survey is widely respected because it publishes reliable scientific research, but for FOIA purposes, the decision to publish a paper and the underlying scientific determination are not one and the same. Without more, we cannot find that USGS has carried its burden to explain the model runs' role in the decision-making process." Wilkins also indicated that the agency had not provided any evidence that disclosure would harm the agency's decision-making process. He pointed out that "we find only claims that releasing the model runs will enable criticism of USGS. But criticism is not a recognized harm against which the deliberative process privilege is intended to protect." (*Paving Coatings Technology Council v. United States Geological Survey*, No. 20-5035, U.S. Court of Appeals for the District of Columbia Circuit, May 7)

A federal court in Minnesota has ruled that the IRS properly withheld records under **Exemption 7(E) (investigative methods or techniques)** in response to a request from tax attorney Nicholas Xanthopoulos and tax law professor T. Keith Fogg for records concerning Section 21.1.3.3 of the IRS Manual pertaining to authentication of third parties who contact the agency on behalf of a taxpayer to request sensitive taxpayer information. Before 2018, the IRS accomplished this by requesting and then verifying the third-party

representative's Central Authorization File number. However, in January 2018, the IRS changed its authentication procedures, adding another requirement that third party representatives provide their own Social Security Numbers to the IRS for authentication when third parties contact the IRS on behalf of a taxpayer. Xanthopoulos and Fogg requested an unredacted copy of Section 21.1.3.3. In response, the IRS withheld portions of the provision, citing Exemption 7(E). Xanthopoulos and Fogg filed an administrative appeal, which was denied. They then filed suit. District Court Judge Susan Richard Nelson first addressed the issue of whether the provision had been compiled for law enforcement purposes. Xanthopoulos and Fogg argued that the provision dealt with administrative matters and not law enforcement. Nelson disagreed. She noted that "the IRS's redacted authentication procedures are 'proactive steps' designed to prevent identity theft and maintain the security of taxpayers' confidential information, as 26 U.S.C. § 6103 requires of it." Citing the agency's affidavit, she indicated that the agency "specifically explains that identity theft and related fraud are significant problems at the IRS. [The affidavit] also explains that the five redactions at issue describe 'specialty situations' in which the IRS uses 'unique' authentication techniques and procedures. And these 'unique' procedures are used to combat the unauthorized disclosure of sensitive taxpayer information, identity theft, and criminal fraud." In response to Xanthopoulos and Fogg's claim that § 6103 did not furnish the IRS with a law enforcement purpose because it only prevented government officials from improperly accessing or sharing taxpayers' sensitive information, Nelson pointed out that "the portions of the IRM at issue in this case, however, do not 'only' relate to governmental oversight of employees' duties. As the IRS has explained, in addition to ensuring employees do not violate § 6103, the redacted portions have another purpose: to combat and prevent identity theft in 'specialty' circumstances." Xanthopoulos and Fogg argued that the redactions did not meet the **foreseeable harm** standard. But Nelson observed that "the IRS has shown that disclosure could reasonably be expected to risk circumvention of the law in the form of identity theft, unauthorized disclosure of taxpayer information, and fraud." (*Nicholas Xanthopoulos and T. Keith Fogg v. Internal Revenue Service*, Civil Action No. 19-03006 (SRN/ECW), U.S. District Court for the District of Minnesota, May 11)

A federal court in Texas has ruled that various components of the Department of Justice **conducted an adequate search** for records requested by Eric Matthews, who was incarcerated at the federal correctional facility in Bastrop, Texas after being convicted of using a computer to attempt to entice a minor to engage in sexual activity and distribution of child pornography via a computer. He sent two requests to the Executive Office for U.S. Attorneys for emails related to his criminal case number, four requests to the Bureau of Prisons – three for records relating to food services and one for records relating to his psychological records – one request to the Office of the Legal Counsel at DOJ for records related to legislation in 80th Congress from 1947-1948. Another request was sent to the Office of the President for records pertaining to legislation in the 80th Congress, while the last was sent to Naval Criminal Investigative Services for records concerning any related search warrant subpoenas. None of the agencies responded within the statutory time limit and Matthews filed suit. EOUSA, BOP, and OLC all responded to Matthews' requests after he filed suit. As a result, the court noted that "Matthews' timeliness claims against them were rendered moot." Matthews argued that a live controversy existed because the agencies had failed to disclose all the records he requested. But the court pointed out that "his claims challenging the adequacy of the agencies' production, however, have not been exhausted administratively. Absent proof of exhaustion or extraordinary circumstances, the Court lacks subject matter jurisdiction over Matthews' FOIA claims challenging the adequacy of production. There is no evidence, and Matthews does not argue, that this case presents an extraordinary circumstance in which exhaustion of administrative remedies is futile." The court then dismissed Matthews' request to EOP, noting that "because the Office of the President is not subject to FOIA, the Court lacks jurisdiction over Matthews' claim." NCIS originally told Matthews that it could find no responsive records, but after Matthews appealed that decision, NCIS agreed to search several databases for emails. However, the agency found that "2007 emails were not searchable due to an intervening change in server ownership and a policy of permanently deleting emails after two years." Dismissing the claims against NCIS, the court found that "there is no

genuine issue of material fact that NCIS's search in response to Matthews' request was adequate and reasonable." The court added that "Matthews' contention that responsive documents must exist does not create a genuine issue of material fact." (*Eric Martin Matthews v. Executive Office for the United States Attorneys, et al.*, Civil Action No. 20-370-RP-SH, U.S. District Court for the Western District of Texas, May 10)

Judge Beryl Howell has ruled that routine disclosure of videos taken during the January 6, 2021, attack on the Capitol intended to be introduced at various trials must wait until the Federal Public Defender's Office has a chance to review individual videos for the prejudicial effect disclosure might have on individual defendants. A coalition of journalism groups asked Howell to allow disclosure of videos related to the Capitol attack to be routinely made available to the press through the public journalism organization ProPublica. Explaining the request, Howell noted that the coalition seeks "a standing order directing the government to contemporaneously release copies of video exhibits admitted in pretrial proceedings in the Capitol Cases to a designated press representative, ProPublica, for further distribution to news organizations and to the public at large." Before ruling, Howell asked the government and the FPD to comment on the request. The government did not oppose the proposal but offered an alternative where such videos would be uploaded to a dop box 72 hours after each proceeding. The government also indicated that the Capitol Police might have some security concerns about videos identifying individuals who had not been charged with a crime. The FPD told Howell it was concerned that "defendants may be prejudiced if all non-sealed video exhibits are presumptively released to the media for potentially broad coverage and that case-by-case considerations should inform the scope and nature of public access." Noting that *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980) provided guidelines for courts to consider in disclosing judicial records, Howell pointed out that "here, petitioners' suggested approach applies a uniform solution that treats all video exhibits in all Capitol Cases the same, allowing full access, copying and dissemination of all video exhibits in these cases without consideration of the potential prejudice to individual defendants. In the face of the legitimate concerns raised by FPD, this proposed approach cannot be reconciled with the legal standard articulated in *Hubbard* requiring a case-by-case analysis, which is also supported by this Court's Local Criminal Rules." Applying *Hubbard* here, Howell indicated that "disclosure of particularly egregious or inflammatory conduct associated with an individual defendant or a particular video clip that 'does not contain the whole event but rather a deliberately chosen or edited clip to support a certain narrative' may present sufficient unfair prejudice at this stage that the presiding judge may decide to delay or limit access in some way. Evaluation of such risks must be carried out on a case-by-case basis." Howell concluded that "the *Hubbard* factors require an analysis based on individual circumstance before requiring, by court order, a policy of broad access and reproduction of Capitol Case video exhibits. While the need for public access and the role of the video exhibits in informing judicial decisionmaking counsel in favor of disclosure, presumptive release, copying and dissemination of video exhibits submitted in Capitol Cases, without regard to any countervailing factors presented by individual defendants, is not warranted given the individualized nature of the prejudice analysis. Consideration of the degree of risk of prejudice from widespread release and reproduction of specific video exhibits in particular Capitol Cases is better assessed on an individual basis by the presiding judge." (*In Re: Press and Public Access to Video Exhibits in the Capitol Riot Cases*, Miscellaneous Action No. 21-46 (BAH), U.S. District Court for the District of Columbia, May 14)

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