Volume 47, Number 11
June 2, 2021

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

D.C. Circuit Finds OIP FOIA Response Violates *AILA* Non-Responsive Precedent 1

Views From the States 3

The Federal Courts 3

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Open government advocates expressed disappointment that the Department of Justice has decided to appeal the recent ruling of Judge Amy Berman Jackson finding the agency seriously misled the court and the public in its characterization of a memo prepared by the Office of Legal Counsel defending the public comments of then Attorney General William Barr suggesting that the Mueller Report had exonerated President Donald Trump of charges that he obstructed the investigation. After reviewing the memo in camera, Berman Jackson concluded that the memo was more political than legal, and that, as a result, the memo was not privileged. Elizabeth Goitein, director of the Brennan Center for Justice's Liberty and National Security Program told the media she was disappointed that Attorney General Merrick Garland had chosen to defend the privilege claim by appealing Jackson's decision to the D.C. Circuit. She noted that "the thing that makes this story so jarring in some ways is the idea that this is the hill that Attorney General Garland wants to die on – that he's willing to fight for OLC secrecy for this opinion. Which is why this maybe feels unexpected to some people."

D.C. Circuit Finds OIP FOIA Response Violates *AILA* Non-Responsive Precedent

In the first decision by the D.C Circuit that sheds some substantive light on how to apply the D.C. Circuit's ruling in *American Immigration Lawyers Association v. Executive Office for Immigration Review (AILA)*, 830 F.3d 667 (D.C. Cir. 2016), in which the appeals court held that agencies could not withhold records based solely on the assertion that they were non-responsive to the request and, instead could rely only on applicable exemption claims, a panel of the D.C. Circuit has found that the Justice Department's Office of Information Policy improperly separated records into smaller portions solely on the basis of whether or not the agency determined the records were non-responsive.

The case involved a FOIA request from Cause of Action Institute for records concerning communications between a Departmental political appointee and Members of

Congress, their staff, or employees of the White House relating to grants of the Office of Justice Programs, Office on Violence Against Women, and Community Oriented Policing Services, as well as records related to Executive Order 13,457, which restricts the granting of earmarks requested by Members of Congress. OIP identified 1,021 potentially responsive pages and, after referring the request to various components, settled on 143 responsive pages. The agency disclosed 32 pages, withholding 71 pages under Exemption 5 (privileges).

Cause of Action Institute's records challenge focused on four Questions for the Record (QFR), which contain questions posed by members of Congress and, for two QFRs, the corresponding answers provided by DOJ. Writing for the court, Senior Circuit Court Judge Harry Edwards noted that "each document is self-contained, with a single, overarching heading identifying the contents of the document. The questions and answers to each document are consecutively numbered, and all but one of the documents has consecutively numbered pages. Although it is undisputed that OIP determined that the four OFR documents contained material responsive to Appellant's FOIA request, DOJ nonetheless removed pages and redacted material from the documents. DOJ does not claim that the pages that were removed or the material that was redacted are exempt from disclosure under FOIA. Rather, DOJ simply claims that these pages and material need not be disclosed to Appellant because they constitute 'Non-Responsive Records.'"

Cause of Action Institute filed suit in district court, arguing that DOJ could not withhold records solely because they were deemed non-responsive. Cause of Action Institute also claimed the agency had an improper practice or pattern of segmenting one record into multiple records to avoid disclosure. The district court ruled in favor of the agency on the records issue and dismissed Cause of Action Institute's pattern or practice claim for lack of standing.

But at the D.C. Circuit, Edwards pointed out that "we hold that DOJ's position is untenable." He indicated that "each of the QFR documents at issue here constitutes a unitary record, as demonstrated by DOJ's own treatment of those documents. Therefore, DOJ violated the requirements of FOIA and the commands of *AILA* by withholding non-exempt information from within the responsive records." Edwards observed that OIP had updated its guidance on records in February 2017 after the *AILA* decision. He pointed out that "DOJ does not claim that the OIP Guidance has the force of law. Rather, it merely offers advice to agency officials regarding how they might handle FOIA claims."

Addressing OIP's decision to withhold records on the basis that they were non-responsive, Edwards indicated that "there can be little dispute that OIP, on behalf of DOJ, treated each one of these self-contained QFR documents as a unitary 'record' in this case." He noted that "the Agency released full documents, containing overarching titles and consecutive numbering, and merely redacted some questions and answers from within those documents. Indeed, in one instance the Agency released an entire page containing only a redacted question. This action is inconsistent with DOJ's claimed position that each question constitutes a separate record, and in fact indicates that DOJ viewed the entire QFR document in which that question appeared as a unitary 'record.' Under these circumstances, the question-and-answer pairings were not individual 'records,' but rather were items of information within records." He added that "the Agency's own disclosures demonstrate that it regarded each QFR document, rather than the individual questions and answers therein, as a record. By redacting non-exempt material from within those records, the Agency violated FOIA and this court's precedent."

Edwards dismissed Cause of Action Institute's practice or pattern claim not because it did not have standing but because the issue was not ripe for review. He pointed out that "appellant asks us to declare that DOJ's alleged policy of segmenting one record into multiple records cannot be lawful under any circumstances." He observed that "in this case, DOJ treated each one of the compiled QFR documents as a unitary 'records,' and then redacted non-exempt information from within those records, thereby violating the

requirements of FOIA and the mandate of *AILA*. No bright line rules in the OIP Guidance compelled DOJ's disputed action. Moreover, DOJ does not claim that the OIP Guidance has the force of law, and we do not regard it as legally binding. Our resolution of Appellant's claim in this case, therefore, rests solely on the particular facts of this case, and the requirements of FOIA, and the law of the circuit as it applies to the situation presented."

Circuit Court Judge Neomi Rao concurred in the decision but warned of the practical implications of limiting the ability of agencies to determine the scope of records responsive to requests asking for information that might or might not be retrievable in record format. She pointed out that "this boil-the-ocean approach to FOIA would inundate requesters with irrelevant material and burden agencies with excessive disclosures. To avoid this result, the parallel request-and-release structure of FOIA permits an agency to identify records in part based on the information requested. In other words, FOIA does not allow a requester to go fishing for a file and reel in the file cabinet." (*Cause of Action Institute v. United States Department of Justice*, No. 20-5182, U.S. Court of Appeals for the District of Columbia Circuit, June 1)

Views from the States…

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

Ohio

In its second ruling in the case, the supreme court has found that the Department of Rehabilitation and Correction properly withheld records from the law firm of Hogan Lovells for records related to training activities related to lethal injection execution procedures or protocol because they constituted "records of inmates" which were non-disclosable. In its first decision in the case, the supreme court ruled that the DRC was required to disclose redacted portions of four emails but accepted the agency's claim that some information was inextricably intertwined with exempt information or because DRC had created or received the records after Hogan Lovells had made its request. At that time, the supreme court also found that Hogan Lovells was entitled to court costs and attorney's fees. The supreme court indicated that the remaining redactions in the four emails were appropriate under the attorney-client privilege. But the supreme court also found that records relating to the execution of Warren Henness constituted "records of inmates." The court noted that "the question before this court is whether the records DRC withheld in response to [the request for training activities] are records that relate or refer to an inmate. We hold that the withheld records fit within that definition because they provide specific information about Henness, document the activities that DRC undertook in preparing to execute him, and refer to facts, circumstances, or activities specifically related to Henness." (*State ex rel., Hogan Lovells U.S. L.L.P, et al. v. Ohio Department of Rehabilitation and Correction*, No. 2019-1511, Ohio Supreme Court, May 26)

The Federal Courts…

After receiving a more thorough explanation of why the names of agents from the EPA's Criminal Investigation Division whom had been transferred to the Personnel Security Detail for former EPA Administrator Andrew Wheeler should be withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, Judge Beryl Howell has granted the agency's motion for reconsideration after

ACCESS REPORTS

originally accepting the unchallenged assertions made by the Ecological Rights Foundation that the names of CID officers were publicly available and that disclosure of their identities was in the public interest. ERF submitted a multi-part request to the EPA in 2018, including calendar entries for the Administrator. In its response, the agency redacted names and email addresses of thirty agents assigned to Wheeler's PSD, citing Exemption 6 (invasion of privacy) and Exemption 7(C). In her first ruling, Howell found that the agents' identities were covered by Exemption 7(C) but based on evidence provided by ERF that the EPA frequently identified CID agents in press releases and that disclosure of the number of agents reassigned to protect Wheeler was in the public interest. As a result, she found the agency had not met its burden of proof and ordered the names of the PSD agents disclosed. The EPA quickly moved to ask Howell to reconsider. After the agency submitted a new supplemental affidavit providing more detail, Howell agreed that the agency had now sufficiently shown why the names should remain protected. Although she expressed concerns over whether the agency was legally entitled to reconsideration, Howell indicated that the new information provided by the agency showed that there had been an error of fact in the original decision. She noted that the agency had clarified its policy by explaining that "media reports and press releases provided with plaintiff's Reply to substantiate its claim that EPA routinely releases agent names, in fact, referred only to Special Agents-in-Charge, Acting Special Agents-in-Charge, or Assistant Special Agents-in-Charge by name. In contrast, the CID agents listed in the disputed calendar entries 'appear on the Administrator's calendar in their capacity as PSD agents,' not as CID supervisors, and withholding of their names is therefore also consistent with [agency] policy." Howell then pointed out that "when considered without giving weight to the erroneous belief that EPA itself releases agents' identifying information on a regular basis, this 'strong privacy interest [of PSD agents] in their identities' outweighs the public interest in disclosure identified by plaintiff, although that interest remains substantial." (*Ecological Rights Foundation v. U.S. Environmental Protection Agency*, Civil Action No. 19-980 (BAH), U.S. District Court for the District of Columbia, June 1)

The D. C. Circuit has ruled that because the CIA revised its policy of refusing to search for records on illegal covert operations Jens Porup's **pattern or practice** claim challenging the policy is moot. Porup submitted a FOIA request for records concerning CIA use of poison for covert assassinations. Instead of searching for responsive records, the agency told Porup that since such operations were beyond the agency's legal jurisdiction it had no records. Porup filed suit in district court, arguing that the agency had failed to comply with FOIA and that it had a pattern or practice of illegally refusing to search for such records. While the litigation was ongoing, the CIA revised its policy, prohibiting agency personnel from declining to process records solely because the subject matter was beyond the agency's jurisdiction and instead requiring agency personnel "to engage in a context dependent inquiry as to whether a search may be possible, and whether the Agency's records repositories are likely to contain responsive records." With the policy revision in hand, the agency searched for records responsive to Porup's request and disclosed a number of records. The agency moved for summary judgement on the pattern and practice claim, arguing it was now moot because of the policy revision. The district court ruled in the agency's favor and Porup appealed to the D.C. Circuit. Writing for the D.C. Circuit, Senior Circuit Judge Harry Edwards indicated that Porup's pattern and practice claim was indeed moot. He noted that "in this case, it was the Agency's own action – communicating the new CIA policy described in the Declaration – that allegedly rendered the pattern or practice cause of action moot. Therefore, under the voluntary cessation' doctrine, we may not conclude that the Agency's purported termination of the disputed practice rendered the case moot unless the CIA has demonstrated that '(1) there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" Porup argued that the agency's declarations were not sufficiently explanatory to moot his claim. Edwards rejected the claim, noting that "the Declaration from the Information Review Office of the CIA and the Agency counsel's firm representations provide us with sufficient assurances that the Agency's new policy has displaced the practices contested by Porup." Porup also argued that "the instructions given to CIA personnel must have come in the form of a 'new policy

document.' However, Edwards explained that "there is absolutely nothing in the record to support this suggestion." He added that "given the record in this case, it is clear that the Declaration *is* the best evidence of the CIA's new policy." He pointed out that "Porup has identified nothing within or outside the record that would cause us to doubt that the CIA's new policy is accurately reflected in the Declaration." Porup challenged the agency's subsequent search and withholding claims, arguing that some records fit within an exception in the CIA Information Act including records that had been officially acknowledged in testimony. He argued that *Morley v. CIA*, 508 F. 3d 1108 (D.C. Cir. 2007), required the agency to search its operational files generated after the end of the Church Committee. Edwards disagreed, however, noting that "it does not appear that the *Morley* court intended for its holding on this issue to be so general and all-encompassing as Porup asserts, given the court's ensuing discussion of the material facts on the issue." (*Jens Porup v. Central Intelligence Agency*, No. 20-5144, U.S. Court of Appeals for the District of Columbia Circuit, May 21)

Judge Timothy Kelly has ruled that the Department of State has not shown that the doctrines of **res judicata** or **collateral estoppel** apply to records related to former UN Ambassador Samantha Power's use of unmasked classified records pertaining to Trump presidential or transition team members who were identified pursuant to intelligence collection activities. Judicial Watch submitted its first request in 2017. The Department of State issued a *Glomar* response, neither confirming nor denying the existence of records. At that time, Kelly upheld the agency's *Glomar* defense. Shortly after Kelly's ruling, Judicial Watch submitted the exact same request in 2019. In May 2020, Acting Director of National Intelligence Richard Grenell released a newly declassified memorandum and accompanying list that identified officials who had requested the unmasking of former National Intelligence Advisor Michael Flynn's identity, including Power. As a result of the Grenell disclosure, Judicial Watch filed suit on its 2019 request, arguing that the original *Glomar* defense was waived as to disclosures to Power. Kelly explained that res judicata barred a later lawsuit if a court had ruled on the merits in a case involving the same cause of action and the same parties. Applying the doctrine here, Kelly noted that "the problem with State's argument is that the Grenell Memorandum did not exist when the earlier lawsuit about Judicial Watch's original request was pending. Thus, Judicial Watch could not have raised claims based on it, and it has changed the legal issues involved in this case." Addressing the application of collateral estoppel, Kelly observed that collateral estoppel gets State no further. Collateral estoppel requires that 'the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case.' But the Grenell Memorandum injects a new, and potentially decisive, issue into the case." Kelly pointed out that "State argues its decision to invoke a *Glomar* response to Judicial Watch's 2017 FOIA request cannot be affected by later developments like the Grenell Memorandum. But this case is not about State's response to Judicial Watch's 2017 request; it is about State's response to its 2019 request." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 20-1729 (TJK), U.S. District Court for the District of Columbia, June 2)

Judge Reggie Walton has ruled that the Department of State properly responded to Judicial Watch's 2012 FOIA request for records concerning an advertisement produced by the U.S. Embassy in Pakistan, entitled "A Message from President Barack Obama and Secretary of State Hillary Clinton," intended to be aired in Pakistan. The parties settled the case in 2014 and Walton dismissed the case. However, the parties agreed to reopen the case in 2015 after the discovery of 55,000 pages of emails from Clinton's private email server. The case was stayed until discovery pertaining to two-related suits was completed. Walton vacated the stay in January 2020 and allowed the summary judgment process to go forward. Judicial Watch argued that it should be allowed to challenge the adequacy of the original search before the case was dismissed. But Walton disagreed, noting that "it is clear that the plaintiff agreed to a dismissal that would have the same effect as a waiver and a final judgment on the merits." Walton then reviewed the circumstances under which the

ACCESS REPORTS

case was reopened. Here, he observed that "these circumstances all indicate that the plaintiff was aware that the case would be reopened for the limited purpose of a new search for records, not to relitigate already settled matters." Assessing the parties' expectations, Walton pointed out that "because the Court recognizes that the Department's new search revealed no records responsive to plaintiff's request, all produced information available to the plaintiff now was also available when it first agreed to dismiss the matter with prejudice." He indicated that "if a government agency completes a search that the plaintiff later agrees merits a dismissal of the matter with prejudice, but the government is subject to having the search challenged based on something unrelated to the earlier search, the government would be disincentivized to act as it did here." Walton then found the new post-dismissal search was adequate. He pointed out that "the plaintiff's FOIA request – which the Court agrees 'is extremely narrow, concerning a single advertisement' – in no way necessitates the exhaustive measures the plaintiff demands. The Department acted sufficiently when it searched the new email records with a consistent focus on either the actual video the plaintiff sought, or terms including others associated with [Cheryl] Mills, [Huma] Abedin, [Jake] Sullivan, and [Phillipe] Reines." (*Judicial Watch, Inc. v. United States Department of State*, Civil Action No. 12-2034 (RBW), U.S. District Court for the District of Columbia, June 2)

The D.C. Circuit has ruled that 18 U.S.C. § 3509, the Child Victims' and Child Witnesses' Rights Act, qualifies as an **Exemption 3 (other statutes)** statute. In 2013, Royce Corley was convicted of three counts of sex trafficking of a minor in the Southern District of New York. Corley submitted three FOIA requests, two of which also cited the Privacy Act, to the Department of Justice. The agency failed to address any of his requests until after he filed an administrative appeal. The Executive Office for U.S. Attorneys instructed the U.S Attorney's Office of the Southern District of New York to process his requests. The agency disclosed 98 pages in full and 58 pages with redactions. The agency also withheld 323 pages that contained identifying information about his victims, citing § 3509. Corley's third FOIA request was sent to the FBI, which initially withheld all records under Exemption 7(A) (interference with ongoing investigation or proceeding). After the investigation was completed, the FBI disclosed 40 pages but withheld 89 pages under § 3509. Corley appealed and the D.C. Circuit appointed an amicus to represent him before the appeals court. The amicus argued that § 3509 did not qualify as an Exemption 3 statute. Writing for the D.C. Circuit, Circuit Court Judge David Tatel acknowledged that that the statute's confidentiality provisions applied to protecting child victims during trial. But he indicated that "stripped to its essence, the statute provides that '*all* employees of the Government' involved in a particular case '*shall* keep all documents that disclose the name or any other information concerning a child in a secure place' and disclose such documents '*only* to persons who, by reason of their participation in the proceeding, have reason to know such information.' This two-part requirement, that documents 'shall' be kept 'in a secure place' and disclosed 'only' to authorized personnel (as opposed to the general public), clearly 'requires that. . .matters be withheld from the public in such a manner as to leave no discretion on the issue.'" Amicus argued that the 1988 Supreme Court FOIA decision, *Dept of Justice v. Julian*, 486 U.S. 1 (1988), holding that pre-sentence reports were not protected by Exemption 3, applied here. Tatel rejected the analogy, noting that "by contrast, the Child Victims' Act unambiguously requires that government employees 'shall. . .disclose documents [concerning a child] or the information in them that concerns a child *only* to person who, by reason of their participation in the proceeding, have reason to know such information.'" Tatel rejected the amicus's argument that the provision did not require withholding information after the trial ended, noting that "but one can act as the custodian of a record 'in connection with a criminal proceeding' long after the criminal proceeding has ended. Moreover, we seriously doubt that Congress intended that sensitive information become publicly available as soon as the criminal case ends." Amicus also argued that the protections only applied to minors and once a victim became an adult the protections no longer applied. Tatel, however, pointed out that "here, the documents at issue concern Corley's minor victims in their capacity as minor victims. Thus, they concern children." (*Royce Corley v. Department of Justice*, No. 19-5106, U.S. Court of Appeals for the District of Columbia Circuit, June 1)

A federal judge in Oregon has ruled that Advocates for the West is entitled to **summary judgment** for the Bonneville Power Administration's failure to respond to its FOIA requests within the statutory time limits. Advocates submitted six FOIA requests for records concerning ongoing public processes involving BPA. Although the agency acknowledged receipt of the requests, it did not provide any information on its intention for processing the requests. The court observed that "BPA does not suggest the acknowledgement letters, or any other communications with Advocates, satisfy FOIA's determination requirement. Rather, BPA claims statutory judgment is improper at this time and Advocates is not entitled to a declaratory judgment on liability" because the proper remedy was to supervise BPA's processing of the request, not to grant summary judgment. The court disagreed, noting that "in this District, an agency's failure to make a determination within the statutory twenty-day period, or thirty-day period for 'unusual circumstances,' is a violation of FOIA." The agency argued that the voluminous nature of the requests, as well as the pandemic, should excuse its failure to respond on time. However, the court noted that it was "sympathetic to the pressures of the pandemic has placed on government agencies and acknowledges that it has slowed the pace of work generally, but such considerations do not excuse statutory deadlines under FOIA." However, the court rejected Advocates claim that BPA should be required to process the remaining records at a rate of 5,000 pages a month was unreasonable. Instead, the court indicated that since there were about 2,500 records remaining to process, the processing rate could remain the same. (*Advocates for the West v. Bonneville Power Administration*, Civil Action No. 20-01028-AC, U.S. District Court for the District of Oregon, June 2)

Judge Amit Mehta has ruled that the Department of Justice may not **consolidate** three cases for records concerning the events of the Jan. 6, 2021, attack on the Capitol. The cases were brought by CREW, American Oversight, and BuzzFeed reporter Jason Leopold, all of whom opposed the government's request to consolidate the cases. Mehta agreed with the plaintiffs that consolidation was inappropriate. He noted that "to begin, a comparison of the document-producing agencies reveals the markedly different scope of each case. The [Leopold] case involves a FOIA request directed at 'DOJ and its 38 components.' The other two cases involve agencies in addition to DOJ. The *American Oversight* action is limited to only two DOJ offices but also includes the Department of Defense, the National Guard Bureau, the U.S. Army, and the U.S. Secret Service. The *CREW* case involves, in addition to documents requested from DOJ, documents requested from the Department of the Interior, DOI's Park Police, the Department of Homeland Security, the Army, and DOD. Although 'identity of the parties is not a prerequisite' to consolidation, the disparate agencies involved portend disputes regarding searches and withholdings that are likely to be unique to each case." He noted that "outside some minimal overlap, the three cases will involve differently scoped searches across multiple different agencies, sub-agencies, and custodians. That reality inevitably will lead to an assortment of declarants describing varying search protocols and withholdings, should disputes arise. The court sees little efficiency to be gained when only a small sub-set of records is common among the three cases." Mehta observed that "although all three cases are in their early stages, and would benefit from a coordinated approach, consolidation is not necessary to achieve efficiencies. The same defense counsel from Main Justice has entered an appearance in all three cases, thereby ensuring that the government will take a uniform approach to these cases across the various agencies and subcomponents involved." (*Jason Leopold, et al. v. U.S. Department of Justice, et al.*, Civil Action N0. 21-0558 (APM), U.S. District Court for the District of Columbia, May 24)

A federal court in Florida has rejected the IRS's request for **reconsideration** of its earlier ruling in FOIA litigation brought by pro se litigant James Scott for a variety of records that the agency claimed were

ACCESS REPORTS

protected by **Exemption 3 (other statues)**, citing § 6103, which protects taxpayer return information. Judge Kenneth Marra found that the only error he had committed in his first opinion was to allow the IRS to classify two disputed material facts as undisputed material facts. After reviewing the records, Marra noted that Scott had disputed that certain records were covered by § 6103 and that other records fell within § 6110, which provides for disclosure unless the records fall within seven exceptions to disclosure. Marra pointed out that "the IRS's argument might have merit if Scott had not disputed the IRS's claim that the documents are not open to the public under § 6110. Now, after briefing on the Motion for Reconsideration, the Court realizes that this key legal conclusion was improperly placed in the section of undisputed facts when it was in fact disputed by Scott. This led the Court to examine the Withheld Pages once again, to see if they fall into any of the categories under § 6110 that makes a document not open to public inspection." He faulted the IRS for its assertion that "these pages are not open to the public under § 6110 is a broad sweeping legal conclusion made without reference to any factual basis to support it. The IRS refers to the confluence of a complex statutory scheme involving 5 U.S.C. § 552(b)(3) and 26 U.S.C. § 6110." The court then observed that after "carefully reviewing the Withheld Pages *in camera*, [it] finds that *they do not fall under any of the statutory exceptions* [to § 6110]." (*James E. Scott v. Internal Revenue Service*, Civil Action No. 18-81750-MARRA, U.S. District Court for the Southern District of Florida, May 24)

Judge Amy Berman Jackson has ruled that the Bureau of Prisons properly responded to a three-part FOIA request submitted by prisoner Edgar Pitts and that the response from the Civil Rights Division at the Justice Department was also appropriate. Pitts' requests to BOP asked for information about the cost of incarceration, a House Oversight and Government Report that had been cited in a *USA Today* article, and the contents of a letter marked "Returned Correspondence" that Pitts had received in 2018. Since the BOP staffer originally responding to Pitts' requests believed that the agency did not have information pertaining to the costs of individual incarceration, she did not initiate a search. However, another staffer concluded that a document showing the typical costs of incarceration at the facility where Pitts was housed was responsive. In response to Pitts' request for the congressional report, BOP told him such a report was not a BOP record. Pitts did not appeal the decision because he got a copy of the report from a fellow inmate. The returned correspondence report pertained to a Black Identity Extremist Report consisting of 22 pages. BOP withheld most of it under several exemptions. Pitts' request to the Civil Rights Division concerned investigations of three high-profile police shootings of blacks. Pitts received all three reports from various sources. Pitts complained that the BOP document on incarceration costs was not responsive to his request. But Berman Jackson noted that "missing from plaintiff's response is any argument to counter BOP's representation that the agency does not maintain cost data for any particular inmate in its custody. Nor does plaintiff address BOP's representation that, to respond directly to his FOIA request, the agency would be required to create records that ordinarily it does not maintain. FOIA imposes no such obligation." Berman Jackson also concluded that because Pitts had received the requested reports from various sources, his requests were now moot. (*Edgar Nelson Pitts v. U.S. Department of Justice, et al.*, Civil Action No. 19-1784 (ABJ), U.S. District Court for the District of Columbia, May 28)

A federal court in Nevada has ruled that Timothy Blixseth's FOIA litigation should **transfer venue** to the District of Columbia for the convenience of the government. Blixseth, who had litigated against the government at least six FOIA cases in the District of Columbia, had sued the FBI in Nevada, which was where he resided. He resisted the government's motion by claiming that the court should give deference to his choice of venue. The court indicated that "plaintiff is correct that there is a strong presumption in favor of Plaintiff's choice of forum. But § 1404(a) 'requires the court to weigh multiple factors in its determination whether to transfer is appropriate in a particular case.' The Court, in consideration of convenience and fairness, finds that multiple factors weigh in favor of transferring this FOIA action in the District of

Columbia." In affirming the government's request, the court noted that "the present action before this Court arises out of the alleged failure of the FBI – a federal agency headquartered in Washington, D.C. – to produce responsive records to Plaintiff's two FOIA requests. The ease and access to the requested records and any potential agency witnesses to the FOIA requests suggest that the District of Columbia, for purposes of convenience, would be the better venue. These relevant factors weigh heavily in favor of transferring this FOIA action to the District of Columbia." The court dismissed Blixseth's arguments, noting that "while Plaintiff's residency in Nevada and choice of format were weighed, it cannot be said that transferring this action to the District of Columbia would present hardship to Plaintiff as there remains at least one pending case in that court, and because Plaintiff has previously filed five other FOIA actions there." (*Timothy L. Blixseth v. Federal Bureau of Investigation*, Civil Action No. 21-00067-MMD-CLB, U.S. District Court for the District of Nevada, May 28)

The D.C. Circuit has ruled that the Union of Concerned Scientists has not shown that it will suffer an informational injury if the Department of Energy adopts a rule restricting access to critical infrastructure information that is similar to one already in force by the Federal Energy Regulatory Commission. The Union had challenged the rule in district court as being arbitrary and capricious under the Administrative Procedure Act. The district court ruled in favor of the agency and the Union appealed. At the D.C. Circuit the Union added a claim that it would be required to expend extra resources if the rule was adopted. Because the D.C. Circuit found that the Union's informational injury claim was speculative, it concluded that the Union did not have standing. The court indicated that "to be denied access to non-CEII under this theory, (1) the Union would need to submit a FOIA request (2) that happens to concern information DOE will have already determine was non-CEII and (3) does not fall under a FOIA exemption, and (4) DOE would need to have determined that returning or destroying the information comports with its various record-keeping polices and requirements. What is more, to produce the injurious scenario of which the Union warns, these moving pieces would have to come together at the same time. This is indeed a hypothetical chain of events on which standing cannot rest." The D.C. Circuit also found the Union's resources claim had been forfeited because it had not been brought up at the district court. In dismissing the resources claim, the D.C. Circuit observed that "any drain on the Union's resources resulting from some aspect of DOE's rule is not obvious, much less the specific drain that the Union identifies in its reply." (*Union of Concerned Scientists v. United States Department of Energy*, No. 20-1247, U.S. Court of Appeals for the District of Columbia, May 28)

Judge Beryl Howell has ruled that the *Los Angeles Times* is not entitled to unseal a search warrant allegedly executed on Sen. Richard Burr (R-NC) in connection with an insider-trading investigation and the government's opposition to that motion. After Burr and his wife sold stocks valued at between $628,000 and $1.72 million, the media raised questions about insider trading because of Burr's membership on the Senate Committee on Health, Education, Labor and Pensions. The *Los Angeles Times* reported in May 2020 that Burr had been served a search warrant as part of the stock sale investigation, although the Department of Justice has never acknowledged the existence of such an investigation. The *Los Angeles Times* concluded that the search warrant must be on the court's docket and filed the motions requesting the unsealing of the search warrant. The government filed a sealed opposition to the *Times*' motion. The *Times* then filed a motion to unseal the government's opposition. Howell acknowledged the common law and First Amendment right of access to court documents but pointed out that "assuming that the requested materials exist, and that the qualified public right of access attaches, no disclosure of search warrant materials would be appropriate in a closed, non-public investigation that has not resulted in criminal charges, and where individual privacy and governmental interests may be implicated." She rejected the *Times* reliance on her decision in *In re Application of WP Co. LLC*, 2016 WL 1604976 (D.D.C., Apr. 1, 2016), which found the investigation involved had been publicly

acknowledged by the government, and pointed out that in her follow-up ruling in *In re WP II*, 201 F. Supp. 3d 109 (D.D.C. 2016), Howell had rejected any attempt to expand the first ruling. Instead, she noted that "without acknowledgment by the government, media coverage regarding the existence of a criminal investigation or search warrant does not extinguish the substantial privacy interest underlying search warrant materials, particularly where the specific information in the materials has not been disclosed." Applying *In re WP II* here, Howell pointed out that "the various privacy and governmental interests in the contents of any search warrant materials – whether framed as privacy interests (under the common law approach) or compelling interests in closure (under the First Amendment approach) – would outweigh the public's interest in disclosure." (*In Re Application of Los Angeles Times Communications LLC to Unseal Court Records*, Misc. No. 21-16 (BAH), U.S. District Court for the District of Columbia, May 26)