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Washington Focus: A coalition of open government advocates has written to the chairs and co-chairs of the Senate and House Armed Services Committees urging them to reject a FOIA amendment proposed by the Defense Department that would exempt military techniques. The letter faulted DOD for failing to bring the exemption to the attention of FOIA-related committees. The letter noted that "input from those committees is necessary to ensure that any changes to FOIA promote consistent transparency and public accountability while allowing the government to withhold information that truly requires protection. A massive authorization bill, which has in previous years been marked up in secret in the Senate, is not the proper vehicle to amend FOIA for the largest executive branch agency."

Court Reaffirms D.C. Circuit Holdings On Exemption of Asylum Officer Analyzes

Judge Trevor McFadden has reaffirmed that Assessments to Refer, which contain recommendations of asylum officers after their interviews with asylum seekers, are largely protected by the deliberative process privilege and that only those portions of the report consisting of factual recitations of the case are non-privileged and disclosable under FOIA. Further, McFadden concluded that Louise Trauma Center, the organization representing four individual plaintiffs, had not shown that it had standing to bring a pattern or practice claim against the agency for its policy of refusing to disclose the analytical portions of the reports.

Louise Trauma Center brought suit against the Department of Homeland Security for refusing to disclose the analytical portions of assessments of four individuals seeking asylum – Amara Emuwa, Michaux Lukusa, Mohammed AlQaraghuli, and FNU Alatanhua. In response to their requests, DHS disclosed hundreds of pages of records in full, released some in part but withheld others in full. Emuwa, Lukusa, and Alatanhua all filed administrative appeals and DHS disclosed more records as a result. The suit challenged whether DHS's Exemption 5 withholding were proper, whether DHS sufficiently complied with FOIA's segregability

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requirement and whether the plaintiffs had provided evidence to support its policy-or-practice and inadequate training claims.

Louise Trauma Center argued that Exemption 5 did not protect the assessment reports. But McFadden noted that "the deliberative process privilege applies to the Assessments. In fact, the D.C. Circuit has already answered this question. In *Abtew v. Dept of Homeland Security*, 808 F. 3d 895 (D.C. Cir. 2015), the Circuit held that Abtew's 'Assessment to Refer' was predecisional and deliberative and therefore covered by the privilege." McFadden indicated that "the Circuit reasoned that the assessment was predecisional because 'it was merely a recommendation to a supervisor,' as 'the supervisor, not the official writing the Assessment, made the final decision.' It was also deliberative because 'it was written as part of the process by which the supervisor came to that final decision. The document thus 'has no operative effect' on its own."

McFadden pointed out that "*Abtew* controls here. The Government's declaration states that Assessments to Refer 'are prepared for and provided to the asylum officer's supervisor for review and approval.'" He observed that "the analysis portion of the Assessments are predecisional. . .[T]he Assessments contain the asylum officer's impression of eligibility after an interview, which he then passes along to a supervisor for review and a final decision. . . The Assessments are also deliberative, as 'they were prepared to help the agency formulate its position."

McFadden also found the Supreme Court's recent decision in *U.S. Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021), in which the Court found that draft biological opinions prepared by FWS under the Endangered Species Act, although final in terms of that agency's statutory role, were not final for purposes of the deliberative process privilege because they still could be rejected or modified by the EPA, supported his conclusion here. He noted that "the Court held that the privilege applied to the drafts because, among other things, they were 'opinions that were subject to change.' It also explained that 'a decision's real operative effect' – meaning 'the legal, not practical consequences that flow from an agency's action' – is 'an indication of finality.'" He observed: "So too here. The Assessments were 'opinions subject to change,' as the asylum officer's supervisor reviews the Assessment and chooses whether to accept its recommendations. If an asylum officer recommends referral, the supervisor could approve it and the agency could issue a "Referral Notice' – which may lead to legal consequences when the applicant appears before an immigration judge for removal proceedings – but the supervisor could also disagree."

Louise Trauma Center argued that the Assessments as a practical matter constituted the final decision of the agency and the supervisor's approval was just a pro forma matter. To support its claim, Louise Trauma Center relied on conversations its attorney had with two former asylum officer's seven years previously. McFadden rejected those claims as hearsay, noting that "this Court, like others, has not allowed government defendants to rely on such evidence because of hearsay concerns, and it will not allow Plaintiffs here to do so either. Nor are allegations from unnamed former government employees enough to undermine the Government's admissible evidence supporting summary judgment."

Likewise, McFadden rejected Louise Trauma Center's claim that the agency's FOIA Officer did not have personal knowledge of the decisions made by asylum officers. He pointed out that the fact that the FOIA Officer had sufficient personal knowledge of how FOIA requests were processed by her agency was sufficient to meet the personal knowledge standard in Rule 56. Louise Trauma Center also relied on *Evans v. Bureau of Prisons*, 951 F. 3d 578 (D.C. Cir. 2020), to support its lack of personal knowledge claim. But McFadden explained that "it was lack of specificity – not personal knowledge – that doomed the affidavit in *Evans*." He pointed out that "the lesson of *Evans* is that 'an agency claiming a FOIA exemption may carry its burden by the production of affidavits,' but 'such affidavits must show, with reasonable specificity, why the documents fall within the exemption.' And the Government complied with this requirement here."

McFadden also found the agency had shown that disclosure of the Assessment analysis would cause foreseeable harm. He relied on *Machado Amadis v. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020), in which the appeals court found that the FBI had shown that disclosure of Blitz forms in which DOJ attorneys identified and analyzed issues presented in FOIA appeals, would cause foreseeable harm if disclosed. Louise Trauma Center argued that the agency here had not met the standard articulated in *Machado Amadis*. But McFadden indicated that "here, as in *Machado Amadis*, the agency has 'specifically focused on the information at issue' in the Assessments – in particular 'the analysis, opinions, deliberations and recommendations of the asylum officer.'"

Louise Trauma Center argued that the agency had failed to show that it properly segregated and disclosed non-exempt information from exempt information. But McFadden pointed out that "the agency released the factual portions of the Assessments but withheld the analysis portions is also evidence that it segregated exempt from non-exempt information." He indicated that Louise Trauma Center had also conceded the adequacy of the agency's search, observing that "DHS determined that any responsive records 'would be located in the [Plaintiffs'] A-Files' – their "Alien File' where 'all immigration transactions involving a particular individual are documented and stored.' The agency has met its burden to 'show that it made a good faith effort to conduct a search for the requested records.'"

Louise Trauma Center contended that DHS had a policy-or-practice of improperly withholding the analysis sections of Assessment reports and that included improper training. McFadden noted that "Louise Trauma Center has not shown that it is likely to suffer a future injury. True, it alleges that it 'helps asylum applicants,' 'has made FOIA requests for Assessments of asylum applicants in the past and will continue to do so in the future.' But mere allegations cannot survive summary judgment." Likewise, he dismissed Louise Trauma Center's claim of inadequate training. He noted that "plaintiffs lack standing to pursue this claim too. Plaintiffs have submitted no evidence showing that they will be harmed by the allegedly inadequate training in the future." (*Amara Emuwa, et al. v. U.S. Department of Homeland Security*, Civil Action No. 20-01756 (TNM), U.S. District Court for the District of Columbia, June 3)

Views from the States…

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

Connecticut

A court of appeals has ruled that the FOI Commission did not err in ruling that an answer key developed by Levitan & Associates, a contractor hired by Connecticut, Massachusetts, and Rhode Island to review and rank proposals submitted by vendors to increase the percentage of electricity generated by renewable energy sources, qualified as a trade secret. Allco Renewable Energy, a solar development company and an unsuccessful bidder, submitted FOIA requests for the proposals submitted by Antrim Wind Energy and Cassadaga Wind, whose proposals had been approved for Connecticut. The Department of Energy and Environmental Protection told Allco that all responsive records were exempt and Allco then filed a complaint with the FOI Commission. At the Commission hearing, the department disclosed a CD containing non-exempt records. Allco then narrowed its request to only records pertaining to Antrim and Cassadaga's proposals as well as Levitan's answer key. The FOI Commission found that the answer key was a trade secret. Allco then filed suit in the trial court, which upheld the Commission's decision. Allco then filed an appeal with the court of appeals. Allco argued that the answer key could not qualify as a trade secret because it had

no intrinsic economic value. The appeals court disagreed, noting that "the department has a statutory duty to obtain value for ratepayers. Thus, although it has no *direct* competitors, the department is nevertheless a participant in the industry with a direct interest in ensuring competitive rates. There is no rational reason to exclude the department from trade secret protection simply because it seeks to cultivate a competitive market of bidders as opposed to being itself a bidder in the industry." Allco also challenged the FOI Commission's finding that the answer key needed to be kept secret. The court pointed out that "the record as a whole reflects that the answer key's entire benefit relies on the department holding it in confidence in order to ensure the integrity of the undertaking for public benefit." (*Allco Renewable Energy Limited, et al. v. Freedom of Information Commission*, No. AC 42992, Connecticut Appellate Court, June 8)

The Federal Courts…

Judge Amit Mehta has ruled that records of prisoners detained by the Fannin County, Texas jail under a contract to house prisoners on behalf of the U.S. Marshals Service are not **agency records** for purposes of FOIA. Alejandro Casillas-Prieto submitted a FOIA request to USMS seeking legal visitation records related to his term of confinement at the Fannin County facility. After Casillas-Prieto filed suit, the agency argued that the records were not agency records. In his first ruling in the case, Mehta found that the agency had not shown that it did not have constructive control of the records under the functional equivalency test articulated by the D.C. Circuit in *Burka v. Dept of Health and Human Services*. 87 F. 3d 508 (D.C. Cir. 1996). This time around, however, Mehta pointed out that "defendant did not exercise the degree of supervision or control over the requested records necessary for the court to conclude that Fannin County acted on behalf of Defendant in creating the records." Casillas-Prieto argued that "by maintaining custody of federal prisoners by way of an Intergovernmental Service Agreement, Fannin County Jail is performing a federal function and thus should be treated as an arm of the USMS." But, Mehta noted, "*Burka* outlines the two criteria to qualify as an 'agency record,' and neither exists here." (*Alejandro Casillas-Prieto v. United States Marshal Service*, Civil Action No. 19-00765 (APM), U.S. District Court for the District of Columbia, June 7)

A federal court in California has ruled the EPA has not justified privilege claims it made in 30 exemplar documents, which were part of its 1172-page *Vaughn* index, under **Exemption 5 (privileges)** in responding to a request from the Ecological Rights Foundation for records concerning instructions issued by the Trump administration prohibiting employees from speaking to the media. Most of the agency's claims were based on the deliberative process privilege. One document pertained to how then Administrator Scott Pruitt might respond to questions asked as part of congressional testimony. Magistrate Judge Donna Ryu rejected the claim, noting that "these documents do not fall within the deliberative process privilege. Generally, preparation for testimony before Congress and responses to questions from lawmakers regarding issues other than substantive policy issues or EPA's statutory duties do not bear on 'the process by which policy is formulated' or 'reveal [EPA's] mode of formulating or exercising policy-implicating judgment.' In fact, these documents reflect discussions about how to communicate decisions that EPA and Pruitt had already made and actions they had already taken, and thus do not qualify as predecisional." While Ryu agreed the agency had shown that two emails were protected by the attorney-client privilege, she found that the agency had failed to explain the **foreseeable harm** from disclosure. She observed that the agency's claims about the issue of the segregability of the privileged emails fell short of the level of proof required. She noted that "this failed to address the harm that would result if the legal advice itself were disclosed, and EPA offers no authority that it need not comply with the requirements of the FIA for documents withheld on the basis of the attorney client privilege. Given its failure to describe any foreseeable harm that would result from disclosure,

EPA may not withhold these documents." (*Ecological Rights Foundation v. United States Environmental Agency*, Civil Action No. 18-00394-DMR, U.S. District Court for the Northern District of California, June 3)

A federal court in Michigan has ruled that U.S. Citizenship and Immigration Services properly responded to Maryann Odor's request for her Alien-file. Odor married Kingsley Ezeokonkwo in Texas in 2018 and since that time had applied to USCIS for permanent resident status for herself and her three sons. In April 2020, the agency notified Ezeokonkwo that it intended to deny his petition for permanent resident status for Odor because of inconsistencies with her Nigerian divorce decree. Odor and Ezeokonkwo submitted a FOIA request to USCIS a year earlier for her Alien-file but filed suit after the agency failed to respond within the statutory time limit. In May 2020, the agency disclosed 839 pages in full and 30 pages in part, after determining that any records questioning her Nigerian divorce would be contained in her A-file. Odor and Ezeokonkwo argued that the court should review 54 withheld pages *in camera*, contending that there was a public interest in disclosure, particularly because the Trump administration seemed so prejudiced against African immigrants. The court rejected the claim, noting that "nothing in the record suggests that any of the withheld documents are in anyway related to policies enacted or enforced during the Trump administration. Instead, it seems as though Plaintiffs are seeking access to the documents to contest their own immigration application – a matter that does not extend to the public at large. Requests made with such a purpose are beyond FOIA's scope." (*Maryann Odor, et al. v. United States Citizenship and Immigration Services*, Civil Action No. 20-11198, U.S. District Court for the Eastern District of Michigan, June 9)

Judge Ketanji Brown-Jackson has ruled that the Bureau of Indian Affairs properly responded to a request from Sean Kovalevich, who was incarcerated in a North Dakota prison after being convicted of crimes that were investigated by the Turtle Mountain Law Enforcement Agency. The agency located 85 documents and told Kovalevich that it would assess him $215 in search fees. Kovalevich filed an administrative appeal, but the agency told him it closed his request because he had not agreed to pay fees. His criminal defense attorney volunteered to pay the fee himself, but the agency apparently told his attorney that Kovalevich now had to file a new request because his original request had been closed. Kovalevich then filed suit. In response to his suit, the agency disclosed all the records without charging fees. Although Kovalevich agreed that the agency's document production was appropriate, he continued to argue that the fee assessment was improper. Brown-Jackson found that the agency's search and its exemption claims were sufficient. She also found that Kovalevich's fee challenge was **moot**. She pointed out that "at the time Kovalevich filed the instant lawsuit, the Bureau had not yet produced any responsive records, but it had expressed an intent to assess fees for Kovalevich's request. Then, during the pendency of the litigation, the Bureau released the responsive documents to Kovalevich – *and it did so free of charge*. Kovalevich's challenges to the Bureau's previously stated intent to assess fees became moot once the agency produced the responsive records 'without seeking payment from him.'" She observed that "to the extent that Kovalevich seeks an order declaring that the Bureau is not permitted to charge him any search fees *in the future*, the Court also lacks jurisdiction to proceed, on the grounds that Kovalevich does not have standing to pursue that request." She added that "Kovalevich has not provided this Court with any reason to believe that the Bureau will assess search fees in connection with the FOIA request that it has already processed. . .and therefore, Kovalevich has failed to establish any concrete, imminent injury that would give him standing to pursue his requested relief." (*Sean Michael Kovalevich v. Bureau of Indian Affairs, et al.*, Civil Action No. 18-0610 (KBJ), U.S. District Court for the District of Columbia, June 14)

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The D.C. Circuit has ruled that Judicial Watch failed to show that subpoenas issued by the House Permanent Select Committee on Intelligence as part of the impeachment proceedings against Donald Trump to telecommunications providers were public records that qualified for disclosure under the common law right of access. As a result, the panel indicated that the records were protected by the Constitution's Speech and Debate clause. Judicial Watch sent a request to the committee for all subpoenas issued during the impeachment proceedings and responses to those subpoenas. After the committee failed to respond, Judicial Watch filed suit in district court. The district court ruled that the lawsuit was barred by the Speech and Debate Clause and Judicial Watch appealed to the D.C. Circuit, arguing that the subpoenas qualified as public records and that disclosure was in the public interest. Writing for the panel, Circuit Court Judge Judith Rogers noted that "Judicial Watch's contention that the Committee's subpoenas 'are outside the ambit of the Speech or Debate Clause because they were issued contrary to the rules of both the House and [the Committee]' also fails. 'An act does not lose its legislative character simply because plaintiff alleges that it violated the House Rules.' Moreover, as the Committee notes, Judicial Watch fails to show that the issuance of the subpoenas in fact violated congressional rules." Rogers concluded that "the court has no occasion to decide whether the Speech and Debate Clause bars disclosure of the public records subject to the common-law right of access in all circumstances. Nor need it consider whether and how the application of the Clause relates to the two-step inquiry to determine whether the common-law right of access applies." Circuit Judge Karen Lecraft Henderson concurred in the result because she concluded that Judicial Watch had not made its case, but indicated that she believed these kinds of records could qualify as public records subject to a public interest disclosure test. Henderson noted that "simply put, the Speech and Debate Clause should not bar disclosure of public records subject to the common-law right of access in *all* circumstances. Instead, the Clause should be considered in weighing the interests for and against disclosure as part of the second-step balancing test." (*Judicial Watch v. Adam B. Schiff*, No. 20-5270, U.S. Court of Appeals for the District of Columbia Circuit, June 4)