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*Washington Focus: Steve Aftergood, the editor of Secrecy News, has weighed in on the recent DOD proposal to create a new FOIA exemption for certain unclassified military information including records on critical infrastructure and military tactics, techniques, and procedures. He observed that "most DoD doctrinal publications are unclassified and are publicly available online. Some are classified. But some are unclassified and restricted [including a recent Army report] that is unclassified but that is only available to government agencies and contractors. The withholding of such documents might be susceptible to a focused challenge under the Freedom of Information Act and DoD apparently wishes to bolster its legal defense against any such challenge."*

## Court Rejects Agency's Exemption Claims

Judge Trevor McFadden has ruled that the Farm Service Agency failed to justify its use of Exemption 3 (other statutes), Exemption 4 (commercial and confidential) and Exemption 6 (invasion of privacy) to protect information about loans provided to family-owned farms in 16 California counties that experienced drought between February 2015 and August 2016. After the Humane Society filed suit in response to the agency's exemption claims, the agency identified a number of irregularities in processing the documents. As a result, McFadden ordered the agency to reprocess the documents. The agency then made three releases of records and redacted materials under Exemption 3. 4, and 6.

McFadden indicated that the agency spent a large portion of its brief defending its decision to withhold data that the Humane Society said it was not interested in obtaining. Indeed, McFadden pointed out that the Humane Society was specifically requesting only the names of loan recipients, the street address of the business, the type of operation receiving the loan, the loan purpose and/or intended use of the loan, and information related to environmental factors that are part of Farm Loan Program reviews.

The agency claimed that the Food, Conservation and Energy Act, 7 U.S.C. § 8791, which protects "information

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concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of the Department," applied. While both parties agreed that § 8791 qualified as an Exemption 3 statute, the Humane Society argued that an exception to the withholding provision authorizing "disclosure of payment information (including payment information and the names of addresses of recipients of payments) under any [Agency] program that is otherwise authorized by law," allowed the agency to disclose the identifying information about the recipients of the loans.

McFadden indicated that the primary issue was whether or not the loan or loan guarantee granted by the agency qualified as a "payment," a term, he noted, which was not defined in the statute. McFadden first pointed out that "an ordinary meaning of 'payment' is the 'disbursement of money.' Under the FLP, 'funds are disbursed' to qualifying borrowers, either directly from the government or through a commercial lender. FLP loans and loan guarantees thus constitute 'payments because they involve transfers of money from one entity (the government or private lender) to another (the borrower)."

The agency argued that a loan could not be a payment because the borrowers had only temporary use of the money and had to pay it back with interest. But McFadden observed that "a repayment presumes there has already been a payment. Whether temporary or permanent, a payment is a payment." However, McFadden distinguished loan payments from loan applications. He noted that "indeed, not all applicants receive loans. So the agency need not disclose loan application materials under Section 8791." McFadden found that all the data points requested by the Humane Society were disclosable under the exception, including the environmental data. Here, he pointed out that "the Agency, not the borrower, generates these documents. Even if they rely on information from loan applicants the Environmental Worksheets are not 'provided by' farmers and ranchers because they reflect Agency analysis and work." However, McFadden indicated that "ultimately the Society's victory here may be hollow. Most of the withheld material under Exemption 3 'consists of loan application forms and supporting documentation.' And to be clear, the Court agrees that the Agency need not release loan applications materials under Section 8791 because they are not 'payment information.'"

Although the agency did not withhold identifying information about loan recipients under Exemption 4, it instead redacted the "funds purpose" or "type of assistance" in some documents. McFadden found Exemption 4 did not apply because the agency had failed to show that the loan recipients customarily and actually treat their loan's purpose as privileged, and that the agency had disclaimed any assurance of confidentiality over this information. To support its allegations of confidentiality, the agency submitted an affidavit from one of the farm owners arguing that its address constituted confidential information. However, McFadden noted that "but the record shows otherwise. [The farm] disclosed its ostensibly confidential street address – with a handy Google maps link – on the farm's public website. Another public website also lists the farm's address and even offers tours of the property." Another affidavit from an agency employee contended that loan recipients did not publicly reveal the purpose for which loans were used. But McFadden noted that the evidence showed otherwise. He pointed out that "the Agency has shared details about borrowers' intended use of their loan proceeds. This prior disclosure undermines the Agency's content that the information is confidential."

McFadden indicated that Systems of Records Notices promulgated by the agency allowed for disclosure of the disputed information as part of routine uses under the Privacy Act. He observed that "for starters, the Society is on the list of those 'who might have access to a borrower's information,' including the 'Purpose of Loan.' The Society is a nongovernmental entity. And the Privacy Act does not prohibit disclosures authorized by FOIA. So the loan application's disclosure applies to the Society's request here." He observed that "some of these 'routine uses,' though, contemplate disclosure to the public." The agency argued that it was not required to show that it offered assurances of confidentiality in every case. McFadden pointed out

that "fair enough, but here, the Agency 'warned that under some circumstances, information will be disclosed.' The Agency's 'notice *disclaimed* confidentiality, rather than provided an assurance of it.'" He added that "borrowers were put on notice that the information they provide – including the loan's intended use – could be shared with nongovernment entities like the Society. This is further evidence that Exemption 4 does not apply."

Although he agreed that the identifying information qualified as a "similar file" under Exemption 6, he found that the Humane Society had made a persuasive argument that disclosure was in the public interest, particularly as it might reflect on impact on the National Environmental Policy Act and the Endangered Species Act. The agency argued that disclosure would shed light on the farms' operations but not those of the government as required under FOIA's public interest standard. McFadden rejected that claim, noting that "the information involves farmers and closely held entities, but it helps ensure the Agency's compliance with NEPA and ESA." (*The Humane Society of the United States v. U.S. Department of Agriculture and Farm Service Agency*, Civil Action No. 17-02570 (TNM), U.S. District Court for the District of Columbia, June 28)

## Views from the States…

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

### Illinois

A court of appeals has ruled that the Chicago Transit Authority properly withheld surveillance video taken by cameras mounted at the Washington Blue Line subway station that took video showing one customer pushing another customer off the platform. The customer who was pushed onto the tracks was helped back onto the platform by other passengers. Using video footage taken by three stationary cameras showing the subway platform, the Chicago police identified and apprehended the assailant and charged him with attempted murder. The Chicago *Sun-Times* submitted a FOIA request to the Chicago Transit Authority for a copy of the video taken by the surveillance cameras. In response, the CTA withheld the video entirely, citing the exemption protecting security measures. The *Sun-Times* then filed suit. While its suit was pending, the individual who had been arrested on attempted murder was put on trial and the trial court agreed to a protective order for evidence related to the charges. As a result, the *Sun-Times*' suit was held in abeyance until the criminal proceedings were concluded. The *Sun-Times* suit then proceeded and the trial court ruled that disclosure of the video surveillance would not harm security measures. The CTA then appealed. The *Sun-Times* argued that the range capabilities of the cameras were evident simply by viewing them on the subway platform. The appeals court disagreed, noting that the *Sun-Times* "did not dispute the fact that viewing the cameras' footage disclosed information regarding blind spots and the quality of the recording. Moreover, the undisputed evidence established that simply locating the cameras on the platform would not provide the public with information about the type of lenses in these cameras or the aperture setting for the lenses at the time of recording, which could be different from the factory settings." (*Chicago Sun-Times v. Chicago Transit Authority*, No. 1-19-2028, Illinois Appellate Court, June 24)

A court of appeals has ruled that the Cook County Office of the President, which provides administrative support to the Cook County Board of Commissioners, failed to show that a handful of contested emails qualified for protection under the deliberative process privilege. The case involved a request submitted by Chicago Public Media for communications about Cause the Effect Chicago, a political action committee chaired by Bridget Gainer, a commissioner on the CCB. When Chicago Public Media filed suit in the trial

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court that court ruled in favor of the agency. Chicago Public Media then appealed to the court of appeals. One email chain dealt with edits to Gainer's Wikipedia page. The appeals court found this email exchange was not privileged, noting that "the track edits alone do not reflect predecisional communications about any substantive governmental policy or actions or about a policy relating to the dissemination of information. Additionally, the edits relate to factual content on the commissioner's Wikipedia page." The appeals court also rejected the agency's privilege claims concerning an exchange with a reporter. Here, the appeals court observed that "the questions were not seeking information about any governmental policy or action, and the redacted email and draft answers do not reveal any deliberative process as to any substantive government policy." The appeals court concluded that "OCCP failed to meet its burden to establish that the challenged redactions at issue pertain to the deliberative process for the development of governmental policy or actions relating to the dissemination of information and failed to show that the production of the redacted information would reveal the deliberative process for any underlying substantive policy." (*Chicago Public Media v. Cook County Office of the President*, No. 1-20-0888, Illinois Appellate Court, First District, June 25)

A court of appeals has ruled that the trial court erred in finding that the Cook County Health and Hospital System properly withheld information identifying the year in which gunshot wound victims were reported to law enforcement agencies because it constituted a medical record that was exempt from disclosure under the Illinois Freedom of Information Act. The *Chicago Sun-Times* requested non-identifying data that included the year in which victims were referred to law enforcement agencies. CCHHS redacted the information, arguing that disclosure could lead to the identification of victims' medical records. The trial court ruled in favor of CCHHS, and the *Sun-Times* appealed. At the appeals court, CCHHS argued that the *Sun-Times* had waived its ability to challenge the redaction of the year because it had actually requested the time/date, rather than the year data, when it filed suit at the trial court. But the appeals court noted that "it is sufficient to note that the year is unquestionably part of the time/date' and that the narrowing of the request reflects an implicit concession by the Sun-Times that it was not entitled to the more specific date and time information. So while we recognize a narrowing of its request, we do not find that the Sun-Times forfeited this issue." CCHHS argued that disclosure could lead to identification of victims contrary to the restrictions of HIPAA. But the appeals court explained that HIPAA allowed for disclosure of de-identified information and that "here, the Sun-Times seeks *only* the year of admission for patients with gunshot wounds, *without* any identifiers. Further, the year of notification to law enforcement does not convey any identifying information. Although CCHHS claimed that gunshot wound victims from Stroger Hospital could be identified, the appeals court pointed out that "more significantly, the Sun-Times is seeking only the *year* of admission of patients with gunshot wounds and the *year* law enforcement was notified. By CCHHS' own admission, thousands of patients are admitted to Stroger Hospital with gunshot wounds every year. It strains credulity to imagine that any specific patients could be identified merely by the year that they were admitted, and the year law enforcement was notified of their admission." The appeals court also rejected CCHHS's claim that the year data was protected by the privacy exemption. The appeals court noted that "the year of admission for a specific injury is not private information where it is entirely divorced from any personally identifying information." (*Chicago Sun-Times v. Cook County Health and Hospital System*, No. 14-19-00521, Illinois Appellate Court, June 30)

## Texas

A court of appeals has ruled that the Secretary of State properly withheld the phone numbers and email addresses of Texas' presidential electors in response to a request from Douglas Lamb. In responding to Lamb's request, the Secretary of State disclosed the identities of presidential electors but invoked an exemption indicating the email addresses of members of the public corresponding with the government were to be considered confidential. Citing *Austin Bulldog v. Leffingwell*, 490 S.W. 3d 240 (Tex. App. 2016), the appeals court explained that "'member of the public,' means someone who does not belong to the

'governmental body.'" Applying the definition here, the appeals court noted that "Texas presidential electors are not a part of any governmental body; they are members of their respective political parties." The court observed that "presidential electors like other members of the public may participate in the government process without also being a member of a state governmental body." (*Douglas Lamb v. Texas Secretary of State*, No. 14-19-00521, Texas Court of Appeals, Houston, June 17)

### Virginia

The federal Fourth Circuit Court of Appeals has ruled that court clerks in Norfolk and Prince William County violated the First Amendment rights of timely access to court records of Courthouse News, a national news service that reports on civil litigation in state and federal courts throughout the country. To compile its daily New Litigation Report, reporters visit their assigned courthouses near the end of each business day to review and report on the complaints filed that day. When Courthouse News reporters began covering Norfolk and Prince William County courts in 2017, reporters experienced delays in getting civil complaints on the date filed. After tracking the data on delays in obtaining complaints over several months, Courthouse News filed suit in July 2018. The district court found that in May 2018, the Norfolk court made only 19 percent of the complaints available on the day of filing and 22 percent of the complaints were not available until two or more days after filing. Similarly, in July 2018, the Prince William County court only made 42.4 percent of the complaints available on the day of filing and 41.5 percent of complaints were not available until two or more court days after filing. However, the district court found that after Courthouse News filed suit, the courts significantly improved access to documents without hiring new staff. Norfolk made 92.3 percent of its complaints available on the day filed and 100 percent of complaints available within one day of filing. Prince William County made 88.1 percent of complaints available on the day filed and 96.5 percent of complaints available within one day of filing. The district court ordered the clerks to make newly filed complaints available on the day filed when practicable, and where not practicable, by the end of the next court day. The Fourth Circuit upheld the district court's decision, noting that "the press and public enjoy a First Amendment right of access to newly filed civil complaints. This right requires courts to make newly filed civil complaints available as expeditiously as possible. After considering all of the evidence offered at trial, the district court found that the facts of this case demonstrate that the Clerks did not do so, and so violated the First Amendment." (*Courthouse News Service v. George Schaefer, et al.*, No. 20-1290 and No. 20-1386, U.S. Court of Appeals for the Fourth Circuit, June 24)

## The Federal Courts…

Judge Beryl Howell has ruled that the EPA properly withheld records under **Exemption 5 (privileges)** in response to a FOIA request from PEER for records concerning the 2018 Version-Formaldehyde Assessment. When then EPA Administrator Scott Pruitt testified before the Senate Committee on the Environment and Public Works, he seemed to agree with comments from Sen. Ed Markey (D-MA) that the agency had determined that formaldehyde caused leukemia. As a result, PEER submitted a FOIA request for records concerning the agency's conclusion that formaldehyde caused cancer. In three interim responses, the agency disclosed 138 pages in full, 174 redacted pages, and withheld 99 records entirely. By the time Howell ruled, the only remaining disputed record was the 2018 Version-Formaldehyde Assessment, which the agency withheld under the deliberative process privilege. The EPA uses the Integrated Risk Information System, a multi-step analysis for analyzing select chemicals found in the environment to assess their impact on human health. The 2018 Version-Formaldehyde Assessment was a Step One draft document. Noting that the recent Supreme Court decision in *U.S. Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021), supported the

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agency's claim, Howell observed that "specifically, an assessment at IRS Step One must still proceed through IRS Steps Two and Three – Agency Review and Interagency Science Consultation – during which the draft is substantively reviewed and, crucially, subject to revision as needed. Thus, the agency's view of the 2018 Version-Formaldehyde Assessment being at Step One of the IRIS program 'specifically contemplates further review by the agency after receipt of the draft, and with it, the possibility of changes to the [assessment] *after*' IRS Step One is completed. This possibility for subsequent changes indicates that the 2018 Version-Formaldehyde Assessment is pre-decisional and deliberative." Howell pointed out that "the 2018 Version-Formaldehyde Assessment not only is labeled a draft and subject pursuant to EPA's IRS policy, to internal revision before public release, but also contains ordinary indicia of a draft document, bolstering the conclusion that this document is pre-decisional, deliberative document protected by the deliberative process privilege. Specifically, the 2018 Version-Formaldehyde Assessment contains redlines, indicating proposed changes, and comment bubbles, reflecting commenters' opinions on and proposals concerning specific portions of the draft." PEER argued that Pruitt's testimony implied that a final assessment on whether formaldehyde caused cancer had been completed and existed. But Howell observed that the agency's affidavits "make clear that Pruitt's understanding, as stated at the hearing, was incorrect, and no such version of the formaldehyde assessment, ready for public release, existed. Furthermore, Pruitt's agreement with Senator Markey's understanding was tentative, and he expressly stated that he would need to confirm the status of the formaldehyde assessment and would need to follow up with Markey's office as needed. Follow-up communications from EPA to Senator Markey did not confirm Pruitt's testimony and instead stated that EPA was still 'working to fully implement the recommendations in all IRIS assessments released moving forward.'" (*Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency*, Civil Action No. 18-2219 (BAH), U.S. District Court for the District of Columbia, June 18)

A federal court in Arizona has ruled that NIH failed to show that patient records concerning the Phase I clinical trial of the Moderna vaccine for COVID-19 are protected by **Exemption 6 (invasion of privacy)** in response to a request from the Informed Consent Action Network. After searching the National Institute of Allergy and Infectious Disease's Division of Microbiology and Infectious Diseases database, the agency located a 1,093-page study responsive to the request. Moderna asked the NIH to withhold the entire study under Exemption 4. Moderna subsequently informed NIH that it could release the Safety Report with redactions. NIH redacted patient identifying information under Exemption 6 and then disclosed the redacted study to ICAN. NIH withheld patient information, including adverse events, which are defined as "any untoward medical occurrence associated with the use of an intervention in humans, whether or not considered intervention-related." NIH argued that the patients' Adverse Event data should be redacted because "it is a patient's medical diagnosis pulled directly from the patient's medical record." Judge John Tuchi explained that "the Court agrees that this information when connected with an identifiable individual, likely implicates a privacy interest warranting redaction pursuant to Exemption 6. However, there is no evidence, nor does NIH contend, that the Adverse Event data can be linked to any of the patients who participated in the Phase I trial." NIH relied on the HIPAA Privacy Rule and a report from TransCelerate Biopharma suggesting that adverse events data is an identifier typically collected in clinical trials. Tuchi rejected NIH's justification, noting that "importantly, however, NIH never contends that including a patient's Adverse Event data will increase the risk of identifying the patient. Rather, it cites to the HIPAA Privacy Rule and TransCelerate report to illustrate that the Adverse Event data is information 'concerning [a patient's] personal matters. . .typically treated as private information.' But unless this data is tied to personally identifying information, it does not warrant redaction pursuant to Exemption 6. Notably, NIH fails to cite a single case where the Court upheld the redaction of information where there was no risk that individuals would be personally identified." NIH also argued there was no public interest in disclosure. Tuchi disagreed, noting that "NIAID funded and led the development of mRNA-1273 and sponsored the Phase I trial. Reviewing this data will allow the public to better understand NIH's actions and bases for its decisions." NIH also argued that some of the data had already been made

public in other portions of the report. But Tuchi observed that "however, the unredacted data provides substantially less information than the redacted information. . .Where there was a greater individual privacy interest, the unredacted version of the Adverse Event data may have sufficed. However, because of the *de minimis* privacy interest, the public interest in seeing the full data outweighs any individual privacy concerns." NIH also withheld age data. Tuchi, however, pointed out that "NIH simply concludes that because there were only 85 patients, publicizing their age will lead to their identification. The Court is skeptical that age alone could identify an individual without more information." He noted that "the Report lists the unredacted age data in broad numerical ranges such as '18-55,' and '56-70.' These ranges do not provide the same information as the specific ages of the trial participants. Because the privacy interest in the Age data is trivial and there is a public interest, the Court finds that the redactions are improper." (*Informed Consent Action Network v. National Institutes of Health*, Civil Action No. 20-01277-PHX-JJT, U.S. District Court for the District of Arizona, June 24)

The Fifth Circuit has ruled that the consultant corollary protects exchanges that National Transportation Safety Board investigators had with the manufacturer and operator of a helicopter that crashed and killed a vacationing family from Louisiana during a sightseeing excursion in Hawaii. As part of the investigation, the NTSB investigator appointed party representatives from Blue Hawaiian, which operated the helicopter, and the Federal Aviation Administration. Under an international convention, the French Bureau of Enquiry and Analysis for Civil Aviation Safety, also participated. BEA assigned technical advisors from Eurocopter, a French company that manufactured the helicopter, and Turbomeca, another French company that had manufactured the engine, to assist. Tony Jobe, an attorney representing the family killed in the crash, submitted a FOIA request to the NTSB for records concerning its investigation. Because Jobe failed to provide the required affidavit under 49 C.F.R. § 837.1-4, a separate process for access for parties involved in litigation not involving the NTSB, the agency converted Jobe's request to a FOIA request. The NTSB then reviews 13,000 potentially responsive records, releasing about 4,000 pages to Jobe. Of the 9,000 withheld pages, the agency withheld 2,349 pages under **Exemption 5 (privileges)**. In response to a second FOIA request from Jobe, the agency agreed to re-review the 2,349 pages and disclosed an additional 159 pages. Jobe then filed suit in the Eastern District of Louisiana. The district court upheld nearly all of the agency's claims, but found that neither Blue Hawaiian, Eurocopter, nor Turbomeca qualified for the inter- or intra-agency standard under Exemption 5 and ordered the NTSB to disclose an additional 125 pages. NTSB then appealed that ruling to the Fifth Circuit, arguing the communications were protected under the consultant corollary, which extends the deliberative process privilege to third parties whose participation is focused on helping the agency and who do not have any self-interest of their own. Writing for the court, Circuit Court Judge Stuart Kyle Duncan indicated that the district court had placed too much reliance on *Dept of Interior v. Klamath Water Users Protection Association*, 532 U.S. 1 (2001), in which the Supreme Court found that Indian tribes had their own self-interest adverse to those of the government in the case at hand. Instead, Duncan noted that "this case, in contrast to *Klamath*, involved technical personnel who participated in an agency fact-finding investigation – a process that was designed solely to issue safety recommendations, that does not adjudicate liability, and that was controlled by the agency itself." He added that "given the overall context of the agency process, the companies were 'enough like the [NTSB's] own personnel to justify calling their communications 'intra-agency' under Exemption 5." However, because the district court had rejected the claims solely on the basis that the third parties did not qualify under Exemption's 5 inter- or intra-agency threshold, the Fifth Circuit sent the case back to the district court to determine to what extent the disputed documents were covered by the deliberative process privilege. Circuit Court Judge James Ho, who served as Sen. John Cornyn's counsel during the passage of the 2007 OPEN Government Act, dissented, pointing out that "Eurocopter and Turbomeca are private companies with a clear interest in the NTSB conducting its

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investigation in a manner favorable to their private corporate interests." (*Tony B. Jobe v. National Transportation Safety Board*, No. 20-30033, U.S. Court of Appeals for the Fifth Circuit, June 17)

The Ninth Circuit has ruled that the district court did not err when it declined to award **attorney's fees** to Randol Schoenberg for his FOIA litigation that resulted in disclosure of a small amount of information contained in the sealed warrant issued by a district court judge in the Southern District of New York allowing the FBI to seize and search Anthony Weiner's laptop computer for emails that originated from Hillary Clinton's private email server. Schoenberg submitted a FOIA request to the FBI for an unredacted version of the search warrant and also asked the Southern District judge to unseal the search warrant. The FBI agreed to unseal the warrant but asked the district court judge to redact identifying information for Weiner and an FBI agent. The district court judge granted the FBI's request but also independently redacted information about Huma Abedin, who was then Weiner' wife, that also appeared in the search warrant. That version of the search warrant was placed on the Southern District's public docket and also disclosed to Schoenberg. The FBI justified its redactions in response to Schoenberg's FOIA request by citing Exemption 7(C) (invasion of privacy concerning law enforcement records) and the fact the court's sealing order prohibited the agency from disclosing the warrant without the court's permission. Schoenberg then filed a FOIA suit in the Central District of California to obtain the redacted information from the first release of the search warrant. Around that time, the Office of the Inspector General was working on a report related in part to the warrant materials. To facilitate the OIG's 2018 report, the FBI asked the judge from the Southern District of New York to unseal some of the redactions. In its second release, the district court judge left redacted only the FBI agent's name and Huma Abedin's email address. That version of the search warrant was made public in the 2018 OIG report and also disclosed to Schoenberg in response to his FOIA litigation. Schoenberg then filed a motion for attorney's fees, arguing he had substantially prevailed by forcing the government to unredact the search warrant. The district court judge in the Central District of California found that while the first three factors used in analyzing entitlement to a fee award – public benefit, Schoenberg's commercial benefit, and the nature of Schoenberg's interest in the information – favored an award, the fourth factor – the reasonableness of the FBI's withholding – favored the government. Balancing those four factors, the district court concluded that Schoenberg was not entitled to fees. At the Ninth Circuit, the appeals court indicated that although the district court had not accepted the FBI's claim that Exemption 7(C) protected the search warrant, it concluded that the FBI had reasonably relied on the prohibition against disclosing a sealed record without permission of the sealing court and that, thus, the district court's reliance was reasonable as well. The Ninth Circuit observed that "the SDNY did not leave parts of the warrant materials sealed because of the FBI's requests alone; it had additional and independent reasons to protect the redacted information in the first release. The FBI was therefore not unreasonable to think that its discretion to disclose the redacted information was limited or that disclosing without permission would offend the judicial process." The Ninth Circuit also rejected Schoenberg's claim that the district court had inappropriately balanced the factors. Indicating that it owed deference to the district court's analysis, the Ninth Circuit pointed out that "we owe this deference precisely because the four factors are not equally weighted – they each involve a sliding scale, allowing one or more factors to outweigh the others." (*E. Randol Schoenberg v. Federal Bureau of Investigation*, No. 20-55607, U.S. Court of Appeals for the Ninth Circuit, June 30)

Judge Amy Berman Jackson has ruled that while the FBI has shown that the Murder Accountability Project **failed to exhaust its administrative remedies** in regard to its request for records on the agency's implementation of the Uniform Crime Reporting Act of 1988, its multiple requests to other law enforcement agencies for similar records are still unresolved. MAP uses government database information to identify previously unrecognized serial homicides. Besides the FBI, MAP requested data from the National Park Service, the Bureau of Indian Affairs, and the Defense Department. Along with its FOIA request to the FBI,

MAP also sent a letter to FBI Director Christopher Wray, asking for his assistance in securing the homicide data. The FBI treated the letter to Wray as a second FOIA request. The agency provided MAP with two CDs of data it contended was responsive to the requests. MAP did not file an administrative appeal but included the FBI in its FOIA suit against the all the agencies. Berman Jackson agreed that MAP had not exhausted its administrative remedies. She noted that "plaintiff never addressed the fundamental principle underlying the FBI's denial, that is, whether FOIA requires an agency to compile or create new records, and it chose not to file a timely appeal to air its concerns and generate a record in the manner contemplated by the statute. Under the circumstances, dismissal for failure to exhaust is appropriate." NPS responded to MAP's request asking for data that the agency failed to report under the UFCRA. The agency responded with a two-page table covering the years 1995-2014 and told MAP that more recent data would be contained in DOI's database maintained by the Office of Law Enforcement and Security. NPS argued that MAP had failed to exhaust its administrative remedies by failing to file an administrative appeal. But Berman Jackson indicated that "here, because defendant NPS processed the request, and the agency has already addressed the adequacy of its response on the merits, it appears that there would be little additional benefit to be derived from further consideration of the matter by the agency. Therefore, the Court will not dismiss the claim on exhaustion grounds." She then found that NPS had **conducted an adequate search**. She pointed out that "in light of the agency's detailed declarations regarding its efforts to comply with plaintiff's specific request, the Court finds that NPS conducted a reasonable and adequate search. . ." The Bureau of Indian Affairs responded by disclosing 14,950 individual records without redaction in their original digital format. The records only covered the period from 2014-2019. Since BIA provided no supporting argument as to why MAP had failed to exhaust its administrative remedies, Berman Jackson declined to take up the issue. Turning to the adequacy of the agency's search, she noted that "neither defendant BIA nor [its] declaration addresses why BIA did not produce any records prior to 2014. Since twenty-five years' worth of requested data is not accounted for, or even discussed, one cannot conclude without more from the agency that the search was adequate." The DOD decided that responsive records would be contained in the Defense Incident-Based Reporting System. In response to MAP's requests for service-related incidents, DOD disclosed records from the DIBRS database from each military component. MAP argued that the search was inadequate because no homicide data was released for the first twelve years. Berman Jackson pointed out that "the military defendants struggle to articulate a reason for this deficiency." She added that "the need to search the DMDC DIBRS database in addition is clear, but the military defendants do not explain why that was sufficient on its own. The military defendants emphasize that they did not use search terms to limit responsive data, but that does not go to the question of which databases were searched." Berman Jackson approved DOD's use of **Exemption 6 (invasion of privacy)** to withhold offenders names, social security numbers, and alien registration numbers, observing that "furthermore, plaintiff is not interested in receiving this information." (*Murder Accountability Project v. U.S. Department of Justice, et al.*, Civil Acton No. 19-2478 (ABJ), U.S. District Court for the District of Columbia, June 30)

Judge Dabney Friedrich has ruled that interview notes collected as part of the National Institute for Standards and Technology's investigation of the building collapses at the World Trade Center as the result of the 9/11 terrorist attacks were properly withheld from researcher David Cole under **Exemption 3 (other statutes)**. Cole originally requested the records of NIST's investigation in 2011. The agency withheld the records under Exemption 3, citing section 7(c) of the National Construction Safety Team Act, including eight sets of interview notes. However, due to an oversight, the Director of NIST failed to make a finding under the National Construction Safety Team Act with respect to *former* employees of Salomon Smith Barney. Nonetheless, NIST withheld those interview notes under **Exemption 6 (invasion of privacy)**. In her previous opinion issued August 27, 2020, Friedrich found NIST had failed to show that there were no segregable portions of the interview and gave NIST an opportunity to provide further justification. After the current

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Director of NIST made the required finding pertaining to the National Construction Safety Team Act, the agency dropped its reliance on Exemption 6 and justified its withholding of the interview notes under Exemption 3 instead. Cole argued that under *Maydak v. Dept of Justice*, 218 F.3d 760 (D.C. Cir. 2000), in which the D.C. Circuit held that agencies must claim all applicable exemptions at the district court, NIST had forfeited its right to change its exemption claims. But Friedrich pointed out that "courts typically find the government forfeited the right to claim an exemption when an agency asserts the exemption for the first time only *after* the district court has already ruled in the other party's favor, such as, for instance, in a motion for reconsideration. This is not the case here." She noted that "if the court exercised its discretion and required the 'government to make some threshold showing of good cause to avoid a finding of forfeiture,' NIST has adequately done so. As NIST explained at the outset of this litigation, it failed to invoke Exemption 3 with respect to the notes from Interview 1041704 because the NIST Director's 2008 finding unintentionally omitted former Salomon Smith Barney employees 'due to an oversight.' And NIST invoked Exemption 3 shortly after the NIST Director issued a supplemental finding to address this error." Having found that NIST could invoke Exemption 3 to withhold the interview notes, Friedrich examined whether Exemption 3 actually applied to the information. She noted that "but while an agency must demonstrate that the withholding statute it invokes in conjunction with Exemption 3 'was in effect at the time of the request,' neither Exemption 3 nor § 7306(c) preclude NIST from relying on findings made after a plaintiff's FOIA request was submitted." (*David Cole v. James K. Olthoff*, Civil Action No. 19-1070 (DLF), U.S. District Court for the District of Columbia, June 22)

A federal court in New Mexico has ruled that U.S. Citizenship and Immigration Services properly invoked **Exemption 6 (invasion of privacy)** to withhold a letter pertaining to attorney Victoria Ferrara's client's ex-wife to USCIS withdrawing an immigration petition that had been previously submitted. However, while agreeing that the agency had properly claimed Exemption 6 to withhold identifying information of third parties contained in the letter, the court found that because third party identifying information could be redacted from the letter and that other portions of the letter could be disclosed. Although the agency originally withheld the letter citing Exemption 7(C) (invasion of privacy concerning law enforcement records) and Exemption 7(E) (investigative methods or techniques), after Ferrara filed suit, the agency relied on Exemption 6 instead. Ferrara argued that the agency had **waived** its right to claim a different exemption. The agency argued that "because Section 552(a)(4)(B) provides for *de novo* judicial review of the agency decision, it does not matter whether the agency correctly cites to a different exemption at the judicial review stage; since agencies do not litigate matters, they do not create a record suitable for review, and therefore waiver of arguments not raised at the administrative level is inappropriate." The court agreed with the agency, noting that "the relevant cases consistently recognize the principle that an agency does not waive a FOIA exemption by failing to raise it in the administrative process." After finding that Exemption 6 applied to the letter and that Ferrara had not articulated any public interest in disclosure, the court nevertheless agreed with Ferrara that portions of the letter could be redacted and disclosed. The court indicated that "nowhere have Defendants suggested that this already disclosed content is subject to any exemption." The Court ordered the agency to disclose a redacted copy of the letter "in which the unredacted portion reveals the non-exempt details that Defendants have already disclosed, *i.e.*, the date, the author, and the fact the letter seeks to withdraw the Form I-751." (*Victoria Ferrara v. United States Department of Homeland Security and U.S. Citizenship and Immigration Services*, Civil Action No. 20-650 MV/JFR, U.S. District Court for the District of New Mexico, June 28)

A federal court in Washington has ruled that attorney Michael Withey is not entitled to **attorney's fees** but that Fred Diamondstone and Leah Snyder, two attorneys who helped Withey in his FOIA litigation seeking records from the FBI on the investigation into the murders of Domingo and Gene Viernes in Seattle are entitled to compensation for the time they spent representing Withey. Judge John Coughenour first noted that

"an attorney fee award based on Michael Withey's services would be inappropriate. Mr. Withey's work on the case was in the capacity of an attorney *pro se*. The purpose of FOIA's fee award provision is to 'relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government." Coughenour pointed out that Withey had told the court that he was pursuing a decades-old quest to write a definitive book on the murders. He had actually published a book in 2018. Coughenour observed that "given his current and prior statements to the Court, it is clear that Mr. Withey has a significant personal interest in this matter that predated his suit by many years. Therefore, he is a plaintiff-in-fact, *i.e.*, an attorney plaintiff *pro se*. The time he spent pursuing this case was primarily to satisfy his own interests rather than those of his fellow plaintiff. On this basis, a fee award based on his time and costs is inappropriate." Coughenour agreed that Diamonstone and Snyder were entitled to fees. Subtracting the hours spent on issues that were not ultimately successful, Coughenour concluded that Diamondstone was entitled to $12,195 and Snyder was entitled to $8,820. Although the FBI disclosed a substantial number of records after the suit was filed, Coughneour indicated that none of them were the result of a judicial order. Instead, he pointed out that "the relevant contents of the Las Vegas files were promptly released once Defendant finally located documents through updated searches. This is simply a correction of an error – not a change in position. The public domain information was released once Defendant determined, albeit with Plaintiffs' help, that it was now publicly available. This is a change in circumstances – not a change in position." (*Michael E. Withey and Sharon Maeda v. Federal Bureau of Investigation*. Civil Action No. 18-1635-JCC, U.S. District Court for the Western District of Washington, June 28)

Judge John Bates has ruled that video exhibits submitted as part of charges against Federico Klein for his part in the Capitol riot on January 6, 2021, may become part of the video exhibits available to the press under the common law access to judicial records. Klein argued that disclosure of the records would prejudice his case. Bates initially pointed out that "the application [from the press] is slightly confusing in this regard, but only because the Press Coalition presumes that the videos 'referenced' in the court filings were indeed provided to the Court, either via disc or at the April 9 hearing. To be clear, the Court has not received *any* copies of video evidence in *Klein*. The government's opposition brief discussed a substantial amount of video footage (the bulk of which is described in the Statement of Facts attached to the Criminal Complaint against Klein, but the government was not required to file copies of any of these videos with the Court because 'at a detention hearing, the government may present evidence by way of a proffer.' The only *non-public* videos that have been presented to the Court are the clips from the April 9 hearing." However, Bates noted that "because the government played these clips at the hearing in order to influence this Court's decision, they qualify as 'judicial records' subject to a strong presumption of public access." Bates added that "the videos shown at the April 9 hearing, then, are clearly judicial records subject to Standing Order 21-28 [on access to video exhibits in the Capitol Cases]. But those are the only videos in *Klein* that fall within the ambit of the Order and the common law right of public access. Hence, to the extent that the Press Coalition seeks to obtain other videos that are only referenced in court filings, but were never shown or provided to the Court, that request will be denied." (*In re: Application for Access to Certain Sealed Video Exhibits*, Case No. 21-MC-78 (JDB), U.S. District Court for the District of Columbia, June 30)

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