Volume 47, Number 16
August 11, 2021

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: White House Press Secretary Jen Psaki told reporters August 11 that the Biden White House would not disclose visitor's logs for his Delaware residence. In response to questions from the New York Post, Psaki indicated that "I can confirm we are not going to be providing information about the comings and goings of the president's grandchildren or people visiting him in Delaware." Distinguishing between Biden's Delaware visitors and his decision to disclose visitors records under the same policy used during the Obama administration, Psaki pointed out that "these logs give the public a look into the visitors entering and exiting the White House campus for appointments, tours and official business – making good on President Biden's commitment that every president is always working, no matter where they are."

Court Finds Messaging Records Protected by Privilege

The ruling of a federal court in New York in a suit brought by journalism professor Charles Seife for records on the press policies of the FDA brings the Second Circuit substantially closer to the position articulated by the D.C. Circuit pertaining to talking points used by agency officials when responding to inquiries from the media. While district court judges in the D.C. Circuit have consistently taken the position that records pertaining to the preparation of talking points to be used by agency officials to respond to inquiries from the press or Congress are eligible for protection under the deliberative process privilege as long as they meet the requirements of the deliberative process privilege – that they are pre-decisional and deliberative. By contrast, the Second Circuit has taken a more nuanced approach, concluding that whereas such talking points can be privileged, there are instances in which talking points represent the final articulation of agency policy and are thus neither pre-decisional nor deliberative.

In response to Seife's request, the FDA disclosed 526 pages. Seife filed suit while the agency was still processing his request. As a result, he narrowed the scope of his request. The agency subsequently disclosed 7,450 pages. Seife then disputed 119 records under Exemption 5 (privileges). Those

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records included three Office of Media Affairs policy announcement events and one letter sent by the FDA to the editor of the *New York Times*. The OMA policy announcement events included an August 2010 release by the FDA's Center for Devices and Radiological Health Task Force recommendations relating to CDRH regulatory decision making. The second announcement event was a February 2014 launch of the FDA's "Real Cost Campaign," a marketing campaign aimed at preventing tobacco use by at-risk youth. The third event was the April 2014 announcement of the agency's "Tobacco Deeming Rule," which proposed extending the FDA's regulatory authority to include all tobacco products. The letter to the editor of the *New York Times* dealt with an article in the *Times* that concerned the proposed Tobacco Deeming Rule. The records withheld by the FDA included draft scripts and draft key messages for press interactions, draft anticipated questions and proposed answers for the announcement events, draft communications plans, a strategy memorandum, and email discussions about these four events.

Judge Laura Swain explained that "the core of the parties' dispute is whether documents that relate to the formulation of the FDA's communications strategies and decisions in connection with public announcements of certain substantive policies are covered by the [deliberative process privilege] and therefore exempt from disclosure. Courts have referred to such documents and the communications decisions to which they relate as 'messaging' documents and decisions, and the Court will do so here. The key issue in this case is whether messaging decisions are among the kinds of agency decisions that Exemption 5 was meant to enhance through confidential deliberation." She noted that "Plaintiff argues that messaging decisions (which he also refers to as 'spinning') generally are not protected by the Deliberative Process Privilege unless the messaging decision would reveal deliberations about another substantive policy decision facing the agency. Defendant on the other hand, argues that messaging records may fall within the Deliberative Process Privilege 'regardless of whether they also reflect deliberations regarding substantive agency policy' because messaging discussions 'can be just as deliberative as other agency decision-making.'"

Swain then pointed out the way in which Second Circuit district court judges had treated draft messaging records in the past. Indicating that "courts in this District remain split over the scope of the Privilege," she noted that "historically, courts within this District have taken the approach endorsed by Plaintiff, finding that 'communications concerning how to present agency policies to the press or public. . . typically do not qualify as substantive policy decisions protected by the deliberative process privilege,' and those records are only exempt from disclosure if they 'would reveal the status of internal agency deliberations on substantive policy matters.'" However, she noted that in *Seife v. Dept of State (Seife I)*, 298 F. Supp. 3d 592 (S.D.N.Y., 2018), an earlier case involving Seife's FOIA requests to the Department of State for similar records about the State Department's interactions with the media, "a court in this District endorsed a broader application of the Privilege that is employed by district courts in the District of Columbia. . .finding that messaging decisions are eligible for protection under the Deliberative Process Privilege because 'an agency's decision regarding how to present its substantive policies to the public often involves the evaluation of alternative public relations policies, policies which. . .are audience-sensitive and must anticipate public reaction.'"

Swain noted that in two recent district court decisions – *National Day Laborer Organizing Network v. U.S. Customs and Immigration*, 486 F. Supp. 3d 669 (S.D.N.Y. 2020) and *New York v. Dept of Justice*, 2018 WL 4853891 (S.D.N.Y, Oct. 5, 2018) – district court judges in the Southern District of New York had established an alternative, recognizing that the deliberative process privilege could apply to messaging records unless they "amount to little more than deliberations over how to spin a prior decision, or merely reflect an effort to ensure that an agency's statement is consistent with a prior decision." She explained that "this approach's recognition that messaging decisions reflecting deliberations about how best to communicate a not-yet-finalized or not-yet-announced policy decision can be protected provides an appropriate threshold question for analysis of the current dispute, particularly in light of the testimony proffered by the FDA that messaging

communications are central to the agency's public health mission of educating and informing the public about ongoing health and the agency's responses to those concerns."

Having found the withheld records were eligible for protection under the deliberative process privilege, Swain moved on to assess whether they qualified for the privilege. She upheld all of the agency's claims except for one dealing with a letter to the *New York Times* regarding its coverage of the Tobacco Deeming Rule. Swain noted that "this messaging document reflects an effort to ensure that the newspaper's reporting on the proposed rule and announcement was consistent with the information the agency had provided to the public on April 24, 2014, and thus concerned an already-completed messaging policy decision."

Seife argued that the agency had failed to show that it had met the foreseeable harm standard. However, Swain pointed out that "plaintiff's argument that the foreseeable harm requirement applies to pre-2016 FOIA requests is inconsistent with the plain language of the [FOIA Improvement Act] and with persuasive decisions within the District holding that the FIA imposed 'an independent and meaningful requirement' on agencies to justify withholding documents pursuant to FOIA exemptions. Accordingly, the FIA's foreseeable harm standard is inapplicable to Plaintiff's FOIA request." (*Charles Seife v. United States Food and Drug Administration*, Civil Action No. 15-5487-LTS, U.S. District Court for the Southern District of New York, Aug. 10)

Views from the States…

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

Connecticut

A trial court has ruled that law enforcement agencies must present more than speculation that disclosure of records of cold cases might interfere with future investigation of the case to justify continued withholding of records pursuant to a FOIA request. The case before the court involved a request from documentary filmmaker Anike Niemeyer and Madison Hamburg, the son of Barbara Hamburg, for records involving her unsolved murder ten years earlier. In response to their FOIA request, the Madison, Connecticut police department withheld the records, contending that the case was still under investigation and might eventually be solved. Niemeyer and Hamburg filed a complaint with the Freedom of Information Commission. At the Commission, the hearing officer concluded that the Madison police had provided nothing beyond speculation that the case would be solved and ordered the records released instead. The Madison police initially complied and provided some records, but after Niemeyer and Hamburg complained that more records should have been released under the FOIC's order, the Madison police filed suit, arguing that the FOIC had overstepped its authority. Judge Daniel Klau noted that the issue of what level of proof was needed for a law enforcement agency to categorically withhold such investigatory records was a matter of first impression. Klau indicated that federal FOIA caselaw required that agencies prove that law enforcement proceedings are "pending or *reasonably anticipated*" to qualify for exemption. Klau also noted that the U.S. Supreme Court had recognized categorical exemptions, which did not exist in Connecticut law, but instead "requires exemption claims to be decided on a case-by-case basis." Applying that principle here, he pointed out that "when a law enforcement agency receives a request for investigatory records of an open criminal investigation, it may initially decline the request" on the basis that disclosure would prejudice a prospective law enforcement action. But, he observed, "records that would not cause such prejudice must be released even

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if a prospective law enforcement action is a reasonable possibility. A law enforcement agency may not withhold all investigatory records just because some of them contain information which, if released, could prejudice a prospective law enforcement action." (*John Drum, Chief of Police, Town of Madison v. Freedom of Information Commission*, No. HHB-CV-21063380S, Connecticut Superior Court, Judicial District of New Britain, Aug. 13)

North Carolina

The supreme court has ruled that although the state government appoints some of its members, the North Carolina Railroad Company is a separate private entity and is not the functional equivalent of a government agency. The case involved a suit brought by the Southern Environmental Law Center for NCRC records related to a light rail project between Durham and Chapel Hill that would have used some land owned by NCRC. In upholding the trial court's ruling that NCRC was not a government agency, the supreme court pointed out that "the fundamental difference between a governmental entity and a private one is the extent, if any, to which the entity in question exercises the sovereign authority of the State. As a result, it stands to reason that the extent to which the State exercises sovereign authority, rather than authority derived from some other source, should be an important feature of any determination concerning the applicability of the Public Records Act." (*Southern Environmental Law Center v. North Carolina Railroad Company*, No. 453A20, North Carolina Supreme Court, Aug. 13)

Ohio

The supreme court has ruled that Clermont County Auditor Linda Fraley waived the attorney-client privilege when she did not object to having a 2004 opinion letter written by the Clermont County Prosecutor's Office to Fraley submitted as evidence under seal in proceedings instigated by an affidavit filed by Christopher Hicks, who was Fraley's opponent in the 2018 Republican primary election for the Auditor's Office, accusing Fraley of committing a crime by employing her stepson in the auditor's office. At the time the 2004 opinion letter was submitted in evidence under seal, it was acknowledged that the opinion letter under normal circumstances would be considered protected by the attorney-client privilege. Hicks objected to sealing the opinion letter, but the trial court judge found he did not have standing because he was not a party to the proceedings. Instead, Hicks submitted a public records act request for the 2004 opinion letter. His request was denied based on the attorney-client privilege and Hicks then filed suit. Fraley argued that providing the 2004 opinion letter to the court did not constitute a waiver of her privilege. The supreme court, however, disagreed. It noted that "the special prosecutor was appointed to investigate Fraley after the Clermont County prosecutor recused himself due to the inherent conflict in prosecuting his statutory client. While it is true that a county prosecutor is the legal advisor to all county officers, the special prosecutor did *not* step into this advisory role by virtue of his appointment. Rather, the special prosecutor's relationship to Fraley was adversarial, as would be any relationship between a prosecutor and a criminal suspect being investigated or a defendant being prosecuted. Accordingly, when Fraley voluntarily disclosed the opinion letter to the special prosecutor, she disclosed it to an adverse party outside of her attorney-client relationship with the county prosecutor. And the voluntary disclosure of a privileged communication waives the privilege." (*The State, ex rel. Christopher Hicks v. Linda Fraley*, No. 2020-1121, Ohio Supreme Court, Aug. 12)

The Federal Courts...

A federal court in California has ruled that data on the number of hens held at nine egg producing facilities contained in establishment inspection reports conducted by the FDA on egg producers in Texas,

which was found protected under the old **Exemption 4 (commercial and confidential)** substantial harm test in place before the Supreme Court rejected it in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), is not protected under the new standard requiring proof that the information is both commercial and confidential. In a prior trial, the original judge found that the total number of hens housed at various facilities in Texas were protected by Exemption 4. While that decision was on appeal to the Ninth Circuit, the Supreme Court ruled in *Argus Leader*. The Ninth Circuit remanded the case to the district court to apply the *Argus Leader* holding. By the time the court reheard the case, the only data remaining in dispute was the number of floors, rows, and tiers per hen house in the EIRs of four facilities. U.S. Magistrate Judge Kandis Westmore indicated that the government "has not satisfied its burden of showing that the Hen Housing Information was customarily and *actually* treated as private by the egg producers." The egg producers argued that they kept the hen house configurations private by not allowing public access to their facilities. But Westmore noted that "as for suppliers and servicers, no suppliers or servicers were prevented from disclosing the Hen Housing Information to competitors. In fact [one company] testified that they *relied* on the suppliers' knowledge, knowing that the suppliers were familiar with their competitors' cage equipment. In short, the Hen Housing Information could be – and apparently was expected to be – freely disseminated by employees and those who visited the facilities, including to competitors. Such broad disclosures undermine Defendant's assertions that Hen Housing Information was being kept private or secret." (*Animal Legal Defense Fund v. United States Food & Drug Administration*, Civil Action No. 12-04376-KAW, U.S. District Court for the Northern District of California, July 30)

Judge Amit Mehta has lambasted the claims made by U.S. Immigration and Customs Enforcement that it had properly responded to his previous order that the agency explain why it cannot disclose data elements that it had previously disclosed in response to FOIA requests from the Transactional Records Access Clearinghouse. At an oral status conference, Mehta lost his patience with the agency's response of records that were 95 percent redacted. He noted that "this is nonsense, all right? You've returned to me a document that is 95 percent redacted. That is not all consistent with the history of this case, the testimony, and my findings." He pointed out that "this agency produced these very records to this plaintiff for years, and then you all put on somebody on the witness stand, who was cross-examined by [TRAC's attorney], who said, yeah, you know, a fair amount of this actually isn't problematic, and the only thing that really concerns me are the things that might create linkages between these databases – or between these tables." He continued: "And you have now redacted everything, every single table name, every single attribute or that table name, every field name, which is entirely inconsistent. And it is not my job as a federal judge to get these documents and figure this out. It's your and your agency's." Mehta indicated that "I'm not doing this anymore, because otherwise you all are going to get sanctioned. And I don't know how one really sanctions a federal agency. It's not like you can sanction them in a way that you sanction a party, like money is really going to matter to a federal agency. But you're going to get sanctioned unless something starts happening in this matter that is consistent with what has happened in this case." (*Susan B. Long, et al. v. U.S. Immigration and Customs Enforcement, et al.*, Civil Action No. 14-109, U.S. District Court for the District of Columbia, July 29)

Judge James Boasberg has ruled that the Department of State has done everything it can to respond to Judicial Watch's request for Hillary Clinton's emails while she was Secretary of State. Since Judicial Watch made its request at issue here in 2015, the Department of State processed more than 30,000 responsive records,

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including records identified as responsive by the FBI during its investigation, which were subsequently provided to State. Boasberg previously handled Judicial Watch's Federal Records Act suit, in which Judicial Watch claimed the agency should have referred Clinton's behavior to the National Archives for an investigation. At that time, Boasberg concluded that the State Department had done everything possible to recover the records and an investigation would be pointless. However, in *Judicial Watch v. Kerry*, 844 F.3d 952 (D.C. Cir. 2016), the D.C. Circuit reversed, finding that "the agency could [not] simply ignore its referral duty" if the agency's "initial efforts failed to recover all the missing records (or establish their fatal loss)." On remand, Boasberg once again found that the Government had "exhausted all imaginable investigative avenues . . .to obtain any missing emails." On appeal, the D.C. Circuit agreed that the case was moot. In this case, Judicial Watch challenged the adequacy of the agency's search. However, after reviewing all the steps the agency had taken to recover Clinton's emails, Boasberg observed that "in this context, it is not clear what more Defendant could reasonably have done to locate responsive records to the request for 'any and all emails sent or received by former Secretary of State Hillary Rodham Clinton in her official capacity as Secretary of State.' The Court recognizes that the FRA and FOIA do not serve identical functions; however, the relevant question here is whether the Department reasonably searched the 'files likely to contain responsive materials.' It does not undermine the FOIA inquiry if that universe of files was assembled through another investigation as long as it encompasses all of the files expected to have responsive materials." Boasberg indicated that in *In re Clinton*, 970 F.3d 357 (D.C. Cir. 2020), the D.C. Circuit held that "if a search for additional Clinton emails has been exhausted in a Federal Records Act case – under a statutory scheme that does provide a process for the recovery or uncovering of removed records – the grounds for continued foraging in the more limited context of a FOIA case are fatally unclear." Judicial Watch also challenged a variety of **Exemption 5 (privileges)** claims. Boasberg found that draft talking points for use by Hillary Clinton were privileged. He noted that "here there is no evidence that these talking points were intended for 'actual use during the call or that the call was even scheduled. These talking points are thus 'predecisional' since they were drafted in advance of possible comments with no indication that they were the exact points the Secretary or other officials employed, or that there was a plan for them to be used at all. These points were also generated as part of the deliberative process of lower-level officials helping the Secretary and others determine what they might say." (*Judicial Watch, Inc. v. United States Department of State*, Civil Action No. 15-687 (JEB), U.S. District Court for the District of Columbia, Aug. 3)

Judge Ketanji Brown Jackson has ruled that the Environmental Integrity Project is entitled to **attorney's fees** because of its FOIA litigation against U.S. General Services Administration for records concerning whether the EPA and the Department of Interior had provided GSA with statutorily required travel reports. When GSA received the request, it told EIP to request the two reports directly from EPA and Interior rather than from GSA. EIP told GSA that it specifically requested the reports from GSA to confirm the reports had been properly submitted. Although GSA had indicated that it would not refer the request to EPA or Interior for response, it did so after being persuaded by EIP's administrative appeal, arguing the agency had a duty to refer the requests itself. EPA and Interior provided the reports and once GSA confirmed that the reports were indeed in its system, EIP agreed to dismiss its suit except for its request for attorney's fees. The attorney's fees issue was assigned to Magistrate Judge Deborah Robinson, who concluded that EIP was not entitled to fees because its suit did not cause GSA to process the request. However, Brown Jackson disagreed. She noted that "in its initial response to EIP's FOIA request, GSA disclaimed any responsibility for providing the requested records. . .Nothing about GSA's response indicated any intention of referring EIP's FOIA request to the agencies on its own – to the contrary, GSA unequivocally announced that its advice to EIP regarding how EIP should proceed 'completed [the agency's] action on this FOIA request.'" She observed that "what the record *does* show is that GSA did not agree to refer EIP's requests to the agencies until approximately three months after EIP filed an administrative appeal that argued that GSA had such a duty, and the direct referral was made just three days before GSA's answer to EIP's complaint in this action was due."

Brown Jackson also found GSA had re-referred EIP's requests after being told by EIP that its initial referrals did not include much of EIP's contact information. She pointed out that "because GSA's re-referral emails appear to have been tailored to include most of the information that EIP had faulted GSA for omitting in the initial referrals, this Court has little doubt that the arguments EIP made in the context of this lawsuit substantially caused GSA to re-refer EIP's request." Brown Jackson found that EIP's request served the public interest and that EIP had neither a commercial nor personal motivation in making the request. She then concluded that GSA's failure to automatically refer the request was unreasonable. She noted that "when an agency makes a referral to another agency it is the FOIA request or the responsive document that is being referred – not the requestor itself. This Court is not aware of any authority suggesting that an agency's mere provision of the originating agency's contact information to the requester constitutes a proper referral under the FOIA, and GSA has not cited any case to that effect." Brown Jackson reduced EIP's fee request by removing hours EIP had claimed for reviewing its billing entries. As a result, she awarded EIP $36,578 in fees and $423 in costs. (*Environmental Integrity Project v. General Services Administration*, Civil Action No. 18-0042 (KBJ), U.S. District Court for the District of Columbia, Aug. 6)

Judge Randolph Moss has ruled that the Department of State may not use a "no number, no list" response, in which the agency identifies the categories of visa-processing records that the Department generally maintains and attests that the withheld records all fall within those categories but does not disclose the number or specific nature of each withheld record, as the basis for withholding three records from Olena Zynovieva. Zynovieva, citizen of Ukraine and a resident of the United Arab Emirates, submitted a FOIA request through counsel for records of the Department's Consular Lookout and Support System (CLASS) database concerning herself as well as documents Zynovieva submitted to the department in connection with her past visa applications. According to the State Department, its CLASS database is used by the Department and other agencies to perform namechecks on visa and passport applicants to identify individuals who may be ineligible for issuance or require other special action. The agency located three records, totaling 11 pages. The agency disclosed visa applications submitted by Zynovieva but withheld all the other records under **Exemption 3 (other statues)**, citing 8 U.S.C. § 1202 of the Immigration and Nationality Act, arguing that the remainder of the records were protected by Exemption 3 but that providing information identifying the number and type of records could also harm the purposes of the exemption. Acknowledging that the D.C. Circuit had not accepted the "no number, no list" as applying to the kind of records claimed here by the State Department, the agency nevertheless relied heavily on the D.C. Circuit's opinion in *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), the only D.C. Circuit opinion in which the "no number, no list" defense came up, albeit in the context of Exemption 1 (national security). In *ACLU v. CIA*, the D.C. Circuit provided some guidance on what it would take to convince the court to accept the "no number, no list" defense but did nothing more substantive than to send the case back to the district court. Nevertheless, Moss indicated that "here, the records withheld under § 1202(f) are amenable to categorical treatment. . .But that does not necessarily mean that the [agency's affidavits] adequately justify the Department's withholdings on a categorical basis, such that the Department has carried its burden of demonstrating that Exemption 3 and § 1202(f) apply to the withheld records." He pointed out that "even if the Department cannot identify the number of records at issue, it can surely describe the nature of its processing of the records in greater detail. Such an explanation would give the Court greater confidence that the records Plaintiff seeks do, in fact, all relate to visas." The agency argued that a more detailed *Vaughn* Index would be subject to multiple interpretations. However, Moss observed that "the problem is that the Department has not adequately substantiated this concern, particularly in light of the novelty of the approach the Department urges the Court to endorse and the D.C. Circuit's observation that a 'no number, no list' response is unlikely to pass muster unless supported by 'a particularly persuasive affidavit.'" Sending the case back to the agency, Moss noted that "because the Department has not justified its withholdings, the Court will deny the Department's motions for summary judgment. To the extent that the

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Department can justify its withholding in more detailed declarations, it may renew its motion." (*Olena Zynovieva v. U.S. Department of State*, Civil Action No. 19-3445 (RDM), U.S. District Court for the District of Columbia, Aug. 5)

Judge Christopher Cooper has ruled that the Executive Office for U.S. Attorneys has failed to show that it **conducted an adequate search** in response to FOIA requests from pro se prisoner Gezim Selgjekaj for records concerning his 2013 indictment in the Northern District of Ohio on charges of fraud in connection with the collapse of the St. Paul Croatian Federal Credit Union. Cooper also questioned EOUSA's broad use of **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy. In response to Selgjekaj's 2018 and 2019 FOIA requests for records concerning the grand jury that indicted him, the agency told him they were exempt. Selgjekaj's challenged the agency's categorical invocation of Exemption 3. As a result, the agency located five grand jury transcripts and four pages of other materials, all of which it continued to withhold under Exemption 3. The agency's affidavits explaining its search methodology in responding to his 2018 request said nothing more than that a keyword search would be conducted by the attorneys of record. Cooper pointed out that "here, EOUSA's declarant's say nothing about whether the agency has other files or databases that were not searched but would likely contain responsive records." However, Cooper agreed with the agency that it had properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 5 (privileges)**. Turning to the 2019 request, Cooper indicated the EOUSA's failure to search for records because of its claim that all responsive records were protected by Rule 6(e) was inappropriate. Cooper cited *Flete-Garcia v. Dept of Justice*, 2021 WL 1146362 (D.D.C., Mar. 25, 2021) to explain that while Rule 6(e) covers matters occurring before the grand jury, it does not cover information about the dates on which the grand jury was in session. He pointed out that "this Court, too, declines to hold that as a matter of law that EOUSA may categorically refuse to search for orders commending, terminating, or extending grand juries." Cooper found that EOUSA had failed to cure its problems with a second search, noting that "the declarations before the Court fail to describe that search in reasonable detail." (*Gezim Selgjekaj v. Executive Office for United States Attorneys, et al.*, Civil Action No. 20-2145 (CRC), U.S. District Court for the District of Columbia, Aug. 6)

Judge Timothy Kelly has ruled that the DEA has properly responded to paralegal Barbara Kowal's FOIA request for records related to Daniel Troya, a capital defendant that the Federal Defender for the Middle District of Florida was representing in his post-conviction appeal. Kowal also provided a signed certification from Toya allowing her to obtain access to his records on his behalf. The agency located 418 pages responsive to Kowal's request and withheld records under **Exemption 6 (invasion of privacy)** and **Exemption 7 (law enforcement records)**. In his first ruling in Kowal's suit, Kelly found the agency had conduct an adequate search but indicated the agency had not yet justified its exemption claims. This time, however, Kelly found the DEA had justified its exemptions claims. Kowal argued that the agency had still failed to justify its exemption claims in its supplemented *Vaughn* index. However, Kelly indicated that "it is unclear to the Court what further details the DEA could provide without revealing the exempted content. And in looking at the DEA's *Vaughn* indices alongside its declaration, the nature of the redacted material is clear." Kowal claimed that identifying information that had been withheld had been disclosed during Troya's trial. But Kelly noted that "but she does not link up 'specific' trial documents that are 'identical' to those withheld or redacted by the DEA. While perhaps the identities of some individuals involved in the investigation were revealed at trial, Kowal does not meet her burden to show that the identical documents and information that DEA seeks to withhold here were made public then." While approving the agency's withholding of identifying information from its Narcotics and Dangerous Drugs Information System under **Exemption 7(E) (investigative methods and techniques)**, Kelly indicated the agency had so far not shown information in the DEA's Agents Manual was also protected by the exemption. He noted that "because of the brevity and

vagueness of these statements, the Court is unable to determine whether such references truly risk revealing techniques unknown to the public. More specifically, it is unclear what law enforcement procedures are at stake and how references to the DEA Agents' Manual might disclose those procedures." (*Barbara Kowal v. United States Department of Justice, et al.*, Civil Action No. 18-938 (TJK), U.S. District Court for the District of Columbia, Aug. 3)

Judge Randolph Moss has ruled that the Department of State properly responded to a request from Citizens United for records concerning a 2016 visit to the State Department by Christopher Steele. In his earlier ruling in the case, Moss sided with the agency on all but three documents, where Moss expressed doubts that the agency had justified its exemption claims. The agency withheld portions of two documents under **Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 7(E) (investigative methods and techniques)**. For those two documents, Moss indicated that agency had failed to provide sufficient detail to justify the exemptions. As to the third document, a five-page research document prepared by a third party (not Christopher Steele) about a technical subject containing potential leads of investigative interest to the FBI related to the investigation of Russia's interference in the 2016 Presidential election. The document was transmitted for law enforcement purposes for the State Department to the FBI. The agency withheld the document in full under Exemption 3 and Exemption 7(E). As to that document, Moss found that the agency had not considered whether or not the document was **segregable**. After reviewing the agency's supplemental affidavits, Moss indicated that the agency's Exemption 1 claim covered all the redactions previously claimed under Exemptions 3 and 7(E) as well. While Citizens United argued against that conclusion, Moss noted that "Citizens United does not, and cannot, dispute that the information at issue was properly classified and that disclosure could reasonably cause damage to national security by, for example, allowing adversaries of the United States to discern how the FBI engages with intelligence sources." Moss also found the agency had provided sufficient support on the issue of segregability. Citizens United argued that portions of the withheld five-page document had been officially acknowledged in an Inspector General's report. Rejecting the claim, Moss noted that "because Citizens United has not shown that the 'specific information' that it seeks is already in the public domain and that it is there by virtue of an 'official disclosure,' its argument fails." (*Citizens United v. United States Department of State*, Civil Action No. 18-1862 (RDM), U.S. District Court for the District of Columbia, July 29)

Judge Randolph Moss has ruled that EOUSA has finally resolved a half-dozen year old FOIA lawsuit brought by prisoner Richard Alan King for records concerning the investigation and prosecution of charges against him in Arizona and New York. After Moss initially rejected the agency's claim that the disclosure of some records was prohibited by a court sealing order, the agency located 20,000 pages of potentially responsive records. The agency disclosed 8,818 pages in full and 77 pages in part, withholding 378 pages in full. Although King failed to respond to the agency's summary judgment motion, Moss pointed out that under *Winston & Strawn v. McLean*, 843 F.3d 503 (D.C. Cir. 2016), a non-FOIA case in which the D.C. Circuit held that district courts were required to rule on summary judgment motions even if unopposed by one party, he was required to assess the propriety of the agency's summary judgment motion. Doing so here, Moss noted that "where the FOIA requester does not take issue with the government's decision to withhold specific documents, the Court can reasonably infer that the FOIA requester does not seek those specific records and that there is no case or controversy with respect to those records sufficient to sustain the Court's jurisdiction." King continued to challenge the **adequacy of the agency's search** as well as whether he should have been charged **costs.** Moss agreed the agency had shown its search was adequate. He observed that "unlike in *King I*, the Department is no longer simply relying on the fact that certain records were filed seal in the underlying proceedings to justify withhold them in this case. To the contrary, AUSAs in Arizona sought leave to review

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those sealed materials and then released non-exempt records to King, with permission of the court that had entered the sealing order." Moss concluded that King did not deserve costs. He pointed out that "the record as it currently stands suggests that King sought records about his own criminal prosecution purely for his own benefit, and there is no indication that the public has any interest in learning additional details about King's court cases. Finally, although the litigation has 'dragged on for [more than] 5 years,' King is responsible for much of this delay, and, in any event, the delay has not increased his costs, which consist principally (if not entirely) of his initial filing fee." (*Richard Alan King v. U.S. Department of Justice*, Civil Action No. 15-1445 (RDM), U.S. District Court for the District of Columbia, Aug. 3)