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Washington Focus: The FOIA Project announced August 20 that its brief bank has been recently expanded by the inclusion of briefs donated by plaintiffs' attorneys in 27 different cases in which one or more of the defendants deals with immigration issues, including the Department of Homeland Security, U.S. Immigration and Customs Enforcement, Customs and Border Protection, and U.S. Citizenship and Immigration Services. The FOIA Project's brief bank initiative has been aimed at making briefs available widely to those involved in litigating FOIA requests on behalf of requesters.

D.C. Circuit Finds Browsing Histories Are Not Agency Records

Ruling on a challenge brought by Cause of Action Institute for the Internet browsing records of then OMB Director Mick Mulvaney and then Secretary of Agriculture Sonny Perdue, the D.C. Circuit has found that such records do not qualify as agency records for FOIA purposes. In doing so, however, the D.C. Circuit disagreed with the district court as to "whether something qualifies as an agency record goes to the merits of the case, not to the court's subject matter jurisdiction." The district court considered the four-factor control test articulated in *Burka v. Dept of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). While the district court found that three of the four factors favored treating the browsing histories as agency records, it found that the fourth factor – whether the agency read or relied on the browsing histories – was dispositive in concluding that the browsing histories did not qualify as agency records.

Cause of Action requested Mulvaney and Perdue's browsing histories from OMB and the Department of Agriculture. Both agencies concluded the browsing histories were not agency records because they were not integrated into the agencies' records systems. After the district court ruled against it, Cause of Action Institute appealed to the D.C. Circuit.

Writing for the D.C. Circuit, Circuit Court Judge Neomi Rao indicated that the appellate panel needed first to address the issue of jurisdiction since it "pertains to our

jurisdictional authority, which we must consider irrespective of whether it is raised by the parties." She explained that "subject matter jurisdiction concerns 'a court's power to hear a case.' By contrast, the merits of a dispute pertain to the remedial powers of the court, i.e., whether a party has successfully established the elements of its claim such that a court may grant relief." Turning to the jurisdictional prerequisites of FOIA, she observed that "FOIA authorizes 'jurisdiction to enjoin the agency from withholding agency records. . . improperly. . .from the complainant.' Whether that provision pertains to the court's subject matter jurisdiction or merely its power to order a remedy on the merits has not yet been squarely addressed by this court. The text and structure of FOIA, however, makes clear that whether the requested materials are 'agency records' goes to the merits of the dispute – the 'court's authority to impose certain remedies' – rather than the court's jurisdictional power to hear the case."

She indicated that "Section 5522(a)(4)(B) plainly confers upon courts the power to order a particular remedy – 'to enjoin the agency from withholding agency records. . .improperly.' This text is similar to language in other statutes we have indicated go to the court's remedial authority. Indeed, it is 'commonplace' for the term 'jurisdiction' to be used in the sense of 'specifying the remedial powers of the court.'" She then continued, noting that "understanding Section 552(a)(4)(B) to implicate a court's remedial authority, rather than jurisdiction, is also consistent with FOIA case law and general principles of subject matter jurisdiction." She pointed out that "if Section 552(a)(4)(B) were interpreted as a limitation on subject matter jurisdiction, one of these principles would have to yield. We would have to either overrule our case law explaining that agencies bear the burden of demonstrating that the materials sought are not agency records, or create a class of cases where the plaintiff does not bear the burden of demonstrating subject matter jurisdiction. Instead, we follow the plain meaning of Section 552(a)(4)(B), which confers remedial authority to order the production of agency records."

Rao concluded that "whether requested documents are 'agency records' goes to the merits of the dispute, not the court's subject matter jurisdiction. Although Section 552(a)(4)(B) does not confer subject matter jurisdiction, the district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction over Cause of Action's appeal from the district court's final decision under 28 U.S.C. § 1291."

Having dealt with the jurisdictional issues, Rao then turned to the issue of whether the browsing histories were agency records. She noted that "FOIA limits the documents a requester may receive to those that are 'agency records.' Although the term is not defined in the statute, we do not read the term literally to encompass 'all documents in the possession of a FOIA-covered agency.' Rather, 'the term "agency records" extends only to those documents that an agency both (1) creates or obtains, and (2) controls. . .at the time the FOIA request was made. The agencies do not dispute that they created the browsing histories at issue, so this case turns on their control of the histories."

Burka sets out four factors for considering the degree to which an agency controls records in its possession – (1) the intent of the document's creator to retain or relinquish control over the records, (2) the ability of the agency to use and dispose of the records as it sees fit, (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document has been integrated into the agency's records systems of files. However, Rao indicated that an earlier decision – *Bureau of National Affairs v. Dept of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), "focused on a variety of factors, surrounding the creation, possession, control, and use of the document by the agency."

Rao noted that "the parties dispute which of these two 'tests' – *BNA* or *Burka* – applies, but there is little daylight between them." She pointed out that "in determining whether a document is an agency record in light of the 'totality of the circumstances,' any fact related to the document's creation, use, possession, or control may be relevant. Here, the agencies' retention and access policies for browsing histories, along with

the fact they did not use any of the officials' browsing histories for any reason, lead to the conclusion that these documents are not agency records."

Although Rao indicated that the agencies did not exercise strict controls over browsing histories and allowed employees to decide when to delete their personal browsing histories, Cause of Action Institute argued that the agencies could have exercised more control if they wished to do so. She pointed out that "in addition to considering limitations on the agency's ability to use a document, we also consider as a factor the extent to which the agency *actually* uses the requested document. This inquiry considers whether the document has some connection to agency decisionmaking because personnel have read or relied upon it. Actual use is often 'the decisive factor' when determining whether a requested document is an agency record." (*Cause of Action Institute v. Office of Management and Budget and United States Department of Agriculture*, No. 20-5006, U.S. Court of Appeals for the District of Columbia Circuit, Aug. 20)

The Federal Courts…

The D.C. Circuit has ruled that potentially responsive non-exempt portions of a memo withheld by the National Security Agency memorializing a conversation between President Donald Trump and then NSA Director Admiral Mike Rogers asking Rogers to rebut allegations of coordination between his presidential campaign and the Russian government are equally protected by the **presidential communications privilege** and are not subject to **segregation**. Soon after Robert Mueller was appointed as Special Counsel to oversee allegations that the Russians had interfered with the presidential campaign on behalf of Trump, the *Washington Post* reported on the existence of the memo describing the conversation, written by Rogers' aide, Richard Ledgett. A detailed description of the conversation appeared in the final version of the Mueller report, based on interviews with Rogers and Ledgett but with no reference that the authors had seen or relied on Ledgett's memo. The Protect Democracy Project submitted a broad request to the NSA for records concerning the investigation of Russian interference in the presidential campaign. The NSA issued a *Glomar* response neither confirming not denying the existence of records but amended that response after the Mueller report identified the existence of the memo describing the Rogers/Trump conversation. In response to PDP's FOIA request, the NSA withheld the memo under Exemption 1 (national security), Exemption 3 (other statutes), **Exemption 5 (privileges)**, and Exemption 6 (invasion of privacy). The district court ruled that the memo was protected entirely by the presidential communications privilege and rejected PDP's request that it consider the possibility of segregating and disclosing non-exempt information from the memo. The D.C. Circuit reviewed the memo *in camera*. PDP acknowledged that the memo qualified under the presidential communications privilege but contended that "Trump's request [to refute press stories] falls outside the President's Article II powers so is unrelated to presidential decision-making. Because, in its view, such information falls outside the scope of the privilege, Protect Democracy contends we should require examination of Ledgett's memo to determine which, if any, parts are 'reasonably segregable' and subject to disclosure under FOIA." Writing for the D.C. Circuit, Circuit Court Judge Cornelia Pillard noted that "the problem for Protect Democracy is that, under existing precedent, the presidential communications privilege 'applies to documents in their entirety.'" She pointed out that "even accepting then, Protect Democracy's claim that portions of the Ledgett memo would not be privileged if they existed in isolation, they are nonetheless not segregable under FOIA as part of the memo – a document made to memorialize only one conversation and that, based on our *in camera* review, otherwise falls squarely within the scope of the privilege." She pointed out that in *Judicial Watch v. Dept of Justice*, 432 F.3d 366 (D.C. Cir. 2005), the

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D.C. Circuit had previously rejected that the FOIA's requirement to provide segregable portions applied to documents protected under the attorney work product privilege. Pillard observed that "where an entire document is protected by privilege, as is the case here, 'there simply are no reasonably segregable portions. . .to release *after* deletion of the portions which are exempt.'" PDP also argued that courts have occasionally disregarded exemption claims altogether in matters involving government misconduct. However, Pillard indicated that the cases cited by PDP involved privacy exemptions that included balancing tests. She noted that "no such balancing or consideration of public interest is called for under Exemption 5. . .And, as we have explained, insofar as their incorporation into FOIA by Exemption 5 is concerned, privileges otherwise potentially overcome by a showing of need are not susceptible of such balancing." (*Protect Democracy Project, Inc. v. National Security Agency*, No. 20-5131, U.S. Court of Appeals for the District of Columbia, Aug. 24)

Judge John Bates has ruled that the U.S. Postal Service failed to show that seven documents it withheld from CREW were protected by **Exemption 3 (other statutes), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)** concerning Postmaster General Louis DeJoy's conflicts of interests arising out of his investments in USPS contractors and competitors. USPS located seven responsive documents – four of which pertained to a request for a certificate of divestiture for DeJoy, while the other three documents related to DeJoy's recusal from USPS matters in which he had a conflict of interest. CREW filed an administrative appeal, but USPS affirmed its denial. The agency claimed 39 U.S.C. § 410(c)(2) of the Postal Reorganization Act, which allows the agency to withhold information of a commercial nature, which under good business practice would not normally be disclosed to the public, as an Exemption 3 statute. Bates observed that the case law applying this provision indicated that "commercial records contain the kind of information that a private company not subject to FOIA would seek to protect to maintain a competitive advantage." But Bates noted that "here, the withheld documents detailing DeJoy's financial disclosures, recusal and divestiture obligations, and related communications with [the Office of Government Ethics] are government-specific documents regarding USPS's accountability to the public, not its business operations. By documenting the postmaster general's financial ties in an effort to avoid conflicts of interest and maintain public trust in the agency, USPS is acting in its 'public character' by providing a governmental service accountable to the taxpayers who fund its operations." He indicated that "but there can be little doubt that the proccesual documentation of DeJoy's ethical compliance 'reflects directly on what the government is up to – the core of what FOIA was designed to address.'" USPS argued that if the information was disclosed "it would have difficulty attracting qualified candidates for agency positions if it were required to disclose their financial information obtained in connection with ethics compliance." But Bates explained that "the requested materials were only generated because of ethical rules applicable to federal employment and are not the type of commercial information the PRA seeks to protect." He noted that 'because the Court finds that the requested materials fall outside the PRA's definition of commercial information, they cannot be shielded from FOIA disclosure under Exemption 3." The agency also claimed the records were protected by the attorney-client privilege. CREW argued that "the attorney-client privilege does not protect communications between the ethics counsel of a government agency and an agency employee because the 'client' for privilege purposes in that dynamic is the agency itself." Bates also found that since the Ethics in Government Act required public disclosure of such information, disclosure to third parties waived any privilege. He indicated that "without establishing a plausible attorney-client relationship between DeJoy and ethics counsel or accounting for the high likelihood of third-party disclosure of the documents at issue, USPS cannot invoke the attorney-client privilege to shield any of the requested documents under FOIA Exemption 5." Bates found that Exemption 6 did not apply either. He noted that "public inquiries

into DeJoy's financial portfolio denote a public interest in matters relating to his conflicts based on 'more than mere speculation,' which therefore warrants 'permitting the public to decide for itself whether government action' on DeJoy's watch 'is proper.'" (*Citizens for Responsibility and Ethics in Washington v. U.S. Postal Service*, Civil Action No. 20-2927 (JDB), U.S. District Court for the District of Columbia, Aug. 17)

A federal court in New York has ruled that the Department of Defense properly withheld large portions of the Ring Report, an investigation of charges as to whether Rear Admiral John Ring should be relieved of his command duties at Guantanamo Bay, under **Exemption 1 (national security), Exemption 3 (other statutes)**, **Exemption 5 (privileges)**, and **Exemption 7(E) (investigative methods or techniques)** in response to a FOIA request from *New York Times* reporter Carol Rosenberg. Ring was relieved of his command approximately one year after he assumed command. DOD disclosed a heavily redacted version of the report but re-processed the Ring Report and removed some of the redactions it made originally. Rosenberg argued that some portions redacted under Exemption 1 were not properly classified, particularly references to a drug deal. But District Court Judge George Daniels upheld those claims, noting the agency's declaration "explains that the 'drug deal' referred to in the Ring Report is a military slang term connoting 'the acquisition of material in a roundabout or unofficial manner,' rather than a reference to illegal or illicit activity by a servicemember. Thus, this phrase is related to 'military plans, weapons systems, or operations' within the meaning of Section 1.4(a) of the Executive Order." Daniels added that "therefore, the Court credits the Government's predictions about the potential national security implications of releasing additional information to the public." DOD cited 10 U.S.C. § 130b(a)(1), which allows the agency to withhold identifying information about members of the armed forces assigned to an overseas unit, as an Exemption 3 statute. Rosenberg argued that the agency's redactions under § 130b(a)(1) were too broad. But Daniels pointed out that "while Plaintiffs contend that those pages 'are entirely redacted under Exemption 3' it is clear from the face of the document that the Government is also applying Exemptions 1, 5, 6, and 7 to those portions of the Ring Report. In short, Plaintiffs have provided no reason to doubt the detailed and specific statements provided in the [agency's] declarations." Daniels agreed that the agency had shown that its deliberative process privilege claims were appropriate. As to the Exemption 7(E) claim, Daniels indicated that "the Government contends that the 'release of this information [about the physical security of the detention camps at Guantanamo Bay] would both enable circumvention of physical security measures at Guantanamo and consequentially result in the disclosure of classified information related to detention operations in a manner that would harm national security.' This information falls squarely within the purposes of Exemption 7(E)." (*New York Times Company and Carol Rosenberg v. Department of Defense*, Civil Action No. 19-5779 (GBD), U.S. District Court for the Southern District of New York, Aug. 25)

Judge Christopher Cooper has ruled that the Department of State properly withheld records under **Exemption 5 (privileges)** in response to a FOIA request from Judicial Watch for records concerning the agency's use by employees of the U.S. Embassy in Kiev of the app CrowdTangle to monitor social media activity by several American journalists and Donald Trump Jr. in response to an investigation by journalists into President Joe Biden's son, Hunter Biden, who was employed by the Ukrainian based company Burisma Holdings from April 2014 to April 2019. Judicial Watch requested the scope of the agency's search include unclassified and classified emails and record management systems used by former U.S. Ambassador to Ukraine Marie Yovanovitch, Deputy Assistant Secretary (DAS) George Kent,

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the U.S. Embassy in Kiev, the Bureau of European and Eurasian Affairs (EUR), the Bureau of Global Public Affairs (OPA), and the Office of the Legal Advisor. The agency located 100 responsive records, releasing five documents in full, and 95 in part. Judicial Watch challenged the agency's decision to withhold eight documents in part. Cooper found that the State Department had justified its claim that all the records were protected by the deliberative process privilege and that the agency had also substantiated that disclosure would cause **foreseeable harm**. Explaining the level of analysis required to justify the foreseeable harm threshold, Cooper observed that "the D.C. Circuit [in *Machado Amadis v. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020)] recently sustained a similar withholding under the deliberative process privilege where the agency explained the foreseeable harm at a roughly equivalent level of detail." He indicated that "the record establishes that the State Department 'reasonably concluded that disclosure' of the redacted parts of [the documents] 'would likely impair the candid discussion' of sensitive legal issues in the future. Therefore, this material was properly withheld." (*Judicial Watch, Inc. v. U.S. Department of State*, Civil Action No. 20-124 (CRC), U.S. District Court for the District of Columbia, Aug. 17)

The Ninth Circuit has adopted the ruling in *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), in which the D.C. Circuit held that a FOIA requester must file an administrative appeal rather than proceed directly to court, if the agency actually responded to the request before the requester filed suit, in ruling that attorney Michael Aguirre **failed to exhaust his administrative remedies** by filing suit challenging four FOIA requests he sent to the Nuclear Regulatory Commission concerning an August 2018 incident that happened at the San Onofre Nuclear Generating Station. While Aguirre filed 14 FOIA requests to the NRC concerning the San Onofre incident, he only challenged the agency's decision to reject four requests on the basis that he failed to file an administrative appeal after the agency failed to respond within the statutory time limit. In response to Aguirre's first two FOIA requests, the NRC informed him that it had categorized him as a commercial requester and indicated that the costs for responding to one of the requests was likely to exceed $250 and that the agency would not proceed without an advance payment. As to the second request, the agency asked Aguirre for clarification and suggested that he narrow the request to save money. After hearing nothing from Aguirre, however, the NRC administratively closed the two requests, Aguirre then filed suit. His third request asked for records on a scheduled meeting that had not yet taken place. After the meeting took place, the NRC asked Aguirre if he still wanted the records. He said he did but indicated that he wanted them by noon of that day. After the NRC indicated that such a quick turnaround was impossible because its regulations required giving licensees 30 days to comment on confidentiality claims. Aguirre nevertheless filed suit. As to the fourth request, Aguirre asked for records on the incident provided to other FOIA requesters. The agency responded in several weeks, withholding some records. Aguirre again filed suit. Writing for the Ninth Circuit, Circuit Court Judge Consuelo M. Callahan explained that "under *Oglesby*, a requestor in essence waives his right to immediately sue by waiting to do so until after receiving a response from the agency. At that point he must exhaust." She noted that "while we have not addressed the issue, other courts have followed the D.C. Circuit's lead. We now join our sister circuits, holding that a requestor must exhaust his administrative remedies under FOIA so long as an agency properly responds before suit is filed." Applying the holding in *Oglesby* to the four disputed requests, Callahan found that Aguirre was required to pursue administrative remedies before filing suit but did not. Aguirre argued that his challenge constituted a pattern or practice claim which did not require exhaustion. But Callahan pointed out that "although pattern-or-practice claims are viable under FOIA, and can survive an agency's production of documents, Aguirre does not adequately allege such a claim. His complaints seek orders requiring the NRC to disclose records responsive to his specific requests, rather than injunctive relief against agency handling of FOIA requests more generally." (*Michael J. Aguirre v. United States Nuclear*

Regulatory Commission, No. 20-55177, No. 20-55179, and No. 20-55487, U.S. Court of Appeals for the Ninth Circuit, Aug. 23)

Judge Carl Nichols has ruled that U.S. Immigration and Customs Enforcement **conducted an adequate search** for an audio recording requested by documentary filmmaker Peter King, even though the agency was unable to find responsive records. King requested an audio recording described in a 2003 memo recorded by an ICE informant on August 5, 2003, documenting a murder related to an ICE investigation. The agency initially responded by issuing a *Glomar* response neither confirming nor denying the existence of records, indicating that the records, if they existed, would be protected by Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). King appealed the *Glomar* response, arguing that ICE and the informant had already acknowledged its existence. The Department of Homeland Security upheld its *Glomar* defense and King filed suit. The agency tasked the El Paso field office with conducting the search. That search found no records, but a search of archival records indicated that the investigation had been concluded in 2005 and that the records should subsequently have been destroyed. King argued that since the record at issue was electronic, the agency had failed to show that it conducted an electronic search as well. However, Nichols noted that the agency's search was sufficient, pointing out that "they provided two declarations describing how ICE determined where the relevant records might be located and averred that there was 'no other investigations or matter likely to contain a copy of the recording.' And they have explained why it can no longer locate the audio recording King seeks: according to Homeland Security Investigations policy, the electronic record should have been destroyed five years after the conclusion of the relevant investigation." (*Peter King v. U.S. Department of Homeland Security, et al.*, Civil Action No. 20-00995 (CJN), U.S. District Court for the District of Columbia, Aug. 16)

Judge Ketanji Brown Jackson has ruled that Sean Michael Kovalevich was not entitled to **attorney's fees** for his litigation against the Department of Justice, including tribal law enforcement officers. Kovalevich, a state prisoner in North Dakota, made a FOIA request to the Executive Office for U.S. Attorneys for records about himself. The agency disclosed five pages with redactions. Kovalevich then filed a motion for attorney's fees. Brown Jackson found he was not eligible because of his status as a *pro se* litigant. She pointed out, however, that "while *pro se* litigants may seek *costs* under FOIA, this Court is not in a position to evaluate Kovalevich's request for costs at this time, because the parties failed to brief the issue adequately." She observed that "in the instant case, the parties have briefed Kovalevich's *eligibility* for costs, omitting any discussion of his entitlement to such an award. Thus, the second reason that Kovalevich's cost-motion cannot be granted is that the parties have not provided the Court with sufficient information to assess Kovalevich's request for costs properly and in accordance with the applicable legal standards." (*Sean Michael Kovalevich v. United States Department of Justice, Executive Office for United States Attorneys*, Civil Action No. 18-1671 (KBJ), U.S. District Court for the District of Columbia, Aug. 16)

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