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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: The FOIA Project, part of the Transactional Records Access Clearinghouse, published a report Jan. 13 discussing the increase in FOIA litigation by media plaintiffs. Although FOIA suits filed by the media have typically been rare, the Trump administration apparently opened a floodgate of media litigation. The FOIA Project found that the top litigants were the New York Times Company, with 77 suits, BuzzFeed reporter Jason Leopold with 69 suits, the Center for Public Integrity with 30 suits, the Center for Investigative Reporting with 28 suits, and National Public Radio, with 17 suits. The FOIA Project noted that "in fact, the media alone have filed a total of 386 cases during the four years of the Trump Administration, from 2017 through 2020. This is greater than the total of 311 FOIA media cases filed during the sixteen years of the Bush and Obama Administrations combined."

Court Finds Presidential Privilege Covers Agency Report

In a case brought by Cause of Action Institute to gain access to a Commerce Department report prepared for the President regarding the national security impact of the importation of passenger vehicles and automobile parts under Section 232 of the Trade Expansion Act of 1962, Judge Carl Nichols has agreed with the government that the report is protected by the presidential communications privilege even though Section 232 also requires such reports to be published.

In May 2018, President Donald Trump asked then Commerce Secretary Wilbur Ross to consider initiating a Section 232 investigation into imports of automobiles, including trucks, and automotive parts to determine their effects on U.S. national security. Ross conducted the investigation and prepared a report for Trump, including factual findings and proposed recommendations. In particular, Ross found that "present quantities and circumstances of automobile, and certain automobile parts imports threaten to impair national security" and recommended the President take certain actions to correct the issue. Three months later, Trump issued a proclamation concurring with the Secretary's determination. The proclamation summarized the report's conclusions, including Ross's proposed recommendations and

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quoted directly from the report five times. However, Trump did not invoke his statutory authority to impose tariffs but decided to pursue trade negotiations instead. Those negotiations remain ongoing and have not yet produced an agreement.

In February 2019, Cause of Action sent two FOIA requests to the Department of Commerce – one to the Bureau of Industry and Science, which prepared the report, and one to the Office of the Secretary, which was responsible for transmitting the report to the President. Cause of Action filed suit a month later. Commerce then told Cause of Action that it would withhold the entire report under Exemption 5 (privileges), citing the presidential communications privilege and the deliberative process privilege. At the end of 2019, Congress passed an appropriations act for the Commerce Department. The appropriations act included Section 112, requiring the Secretary of Commerce to publish the report within 30 days of the enactment of the bill, which fell on January 19, 2020. However, Trump issued a presidential statement when signing the bill indicating that some of the proposed dissemination requirements might be protected by executive privilege. On January 17, 2020, the Office of Legal Counsel at the Department of Justice issued an opinion concluding that the disclosure requirement did not overcome the executive privileges that apply to the report.

Nichols began by noting that "the presidential communications privileges is broad – covering both pre-decisional and post-decisional materials and protecting those materials in their entirety. In the FOIA context, it is well settled in this District that an agency maintains the authority to apply the presidential communications privilege." He explained that "the deliberative process, though 'closely affiliated' with the presidential communications privilege, has a distinct scope. This privilege allows for documents created during the government's decision-making process to be protected from disclosure."

Cause of Action argued that Exemption 5 did not apply because the report was not an inter- or intra-agency report. Nichols noted that "the main thrust of this argument is that the recipients of the report – the President and his immediate White House staff – are not agencies under FOIA." Nichols explained that "instead of adopting the narrow construction of Exemption 5 that Cause of Action urges here, the D.C. Circuit (along with several other circuits) has adopted a functional approach to interpreting the statute's inter- and intra-agency requirements. In *Judicial Watch v. Dept of Energy*, 412 F.3d 125 (D.C. Cir. 2005), the D.C. Circuit held that the deliberations of a presidential advisory group could be protected from disclosure under Exemption 5, even thought the group, whose 'sole function was to advise and assist the President,' was not an 'agency' subject to FOIA." Nichols observed that "following this precedent, courts in this District have concluded that documents exchanged between an Executive Branch agency and the President and his close advisors qualify as inter-agency or intra-agency memorandums or letters. The Court will do the same here, and holds that the Automotive Report meets the threshold requirement of being an inter-agency or intra-agency memorandum or letter under Exemption 5 of the FOIA."

Cause of Action asserted that the presidential communication privilege was grounded in the President's Article II duties and did not apply to congressional requirements. But Nichols pointed out that "the D.C. Circuit has consistently cautioned that limiting the protection of the presidential communications privilege to only 'quintessential and nondelegable Presidential power. . .draws an arbitrary line.' Courts in this district have therefore consistently refused to narrow the scope of the privilege to only communications relating to the President's exercise of core Article II powers." Cause of Action also argued that because the report must be published at some time, the President cannot have any interest in keeping it confidential. Nichols observed that "this argument, however, ignores the President's strong short-term interest in keeping the Report confidential while the U.S. Trade Representative continues negotiations and the President continues to consider other options to deal with the national security threat."

Finally, Cause of Action claimed the government had waived any privileges by disclosing the contents of the report as part of the presidential proclaim. Nichols indicated that "an agency may waive its right to claim a FOIA exemption over information already in the public domain. But the mere fact that similar information is already available to the public does 'not necessarily mean that official disclosure will not cause harm' that the FOIA exemptions seek to prevent." He pointed out that "the government waived the presidential communications privilege as to those portions of the Report that are directly quoted in the President's Proclamation. But as to the remainder of the Report. . .the presidential proclamation's brief summary of the findings and recommendations in the Report were not made in the same terms that match exactly the unredacted information contained in the Report." (*Cause of Action Institute v. U.S. Department of Commerce*, Civil Action No. 19-00778 (CJN), U.S. District Court for the District of Columbia, Jan. 14)

The Federal Courts…

A federal court in California has ruled that the Department of Treasury's Financial Crimes Enforcement Network properly withheld the identities of the real human owners of residential real estate purchased with cash since 2016 in response to a FOIA request submitted by Aaron Glantz of the Center for Investigative Reporting under **Exemption 3 (other statues)**, citing the Bank Secrecy Act. CIR submitted a FOIA request to FinCEN for all records containing information submitted in response to geographic targeting orders (GTOs), which require financial institutions and other businesses in a specified geographic area to report certain transactions. The BSA provides that while FinCEN must share these reports with state and federal regulators and intelligence agencies upon request, the reports are exempt under FOIA and any other open records laws. The agency initially issued a *Glomar* response, neither confirming nor denying the existence of records. FinCEN then told CIR that it had located 113,871 pages of responsive records but they were all exempt under the Bank Secrecy Act. The agency also identified Suspicious Activity Reports, which it withheld in full. CIR argued that the Bank Secrecy Act did not apply because it had been amended in 2009 and 2011 without mentioning the OPEN FOIA Act, which requires Exemption 3 provisions passed after 2009 to reference FOIA. Magistrate Judge Joseph Spero disagreed, noting that "although CIR is correct that § 5319 has been amended since 2009, the relevant question under § 552(b)(3)(B) is when the statute was *enacted*, not when it was most recently *amended*." He added that "reading the subsequent 2011 amendment – which expanded the bar against disclosure by adding references to state law while still also squaring addressing FOIA – as implicitly *authorizing* disclosure under FOIA for failure to cite by paragraph Exemption 3 would be contrary to the plain language and clear intent of the BSA." Spero noted that the recent Ninth Circuit decision in *Center for Investigative Reporting v. Dept of Justice*, 982 F.3ed 668 (9th Cir. 2020), which found that since the Tiahrt Rider, prohibiting DOJ from expending funds on responding to FOIA requests for gun trace data, had been rewritten since 2009 without the required reference to FOIA, it did not qualify as an Exemption 3 statute. Spero pointed out that "here, however, the relevant statutory language of § 5319 was enacted well before 2009, and the post-2009 amendment merely supplemented it with additional language not relevant to this case. That addition does not resemble the enactment of an entirely new appropriations rider, as in the case before the Ninth Circuit." CIR argued that the term "record of report" should be interpreted more broadly to allow disclosure of the spreadsheet. But Spero pointed out that "if Congress had intended to exempt only records *underlying* or *accompanying* reports, or only records created by non-governmental entities, it could have written the law to so state." Spero then found that the Bank Secrecy Act fell within an exception for the **foreseeable harm** test, noting that the foreseeable harm test did not apply to the "disclosure of information that is. . .otherwise exempted from disclosure under subsection (b)(3)." Spero also rejected CIR's contention that some state laws required the disclosure of some of the real estate ownership data. He observed that "CIR has submitted no evidence to show that *any* information actually collected by FinCEN overlaps with

information actually placed in the public domain, under any of the laws cited. Nor. . .has CIR shown how FinCEN might reasonably segregate any public information that *might* be in its records from nonpublic information that cannot be disclosed under the BSA." (*Center for Investigative Reporting, et al. v. United States Department of Treasury*, Civil Action No. 19-08181-JCS, US. District Court for the Northern District of California, Jan. 22)

Judge James Boasberg has ruled that a coalition of media groups led by the *Washington Post* is entitled to **attorney's fees** but has reduced its combined request from $154,841 to $122,347 for the coalition's FOIA litigation against the U.S. Small Business Administration for redacting identifying information from records concerning the Paycheck Protection Program under Exemption 4 (customarily confidential) and Exemption 6 (invasion of privacy). The coalition challenged the SBA's exemption claims and in his decision on the merits, Boasberg ruled in favor of the coalition and against the agency. In opposing the coalition's attorney's fees request, the SBA argued that its exemption claims were reasonable. Boasberg noted that the agency's exemption claims were "a novel application" of both exemptions. He observed that "even though the Court ultimately rejected SBA's position on the merits, therefore, one might fairly conclude that the agency had at least a 'colorable or reasonable basis' for its initial determination that FOIA exempted the requested records from disclosure." Boasberg explained that "even assuming, however, that SBA has carried its burden and that this final factor lightly tips in its favor, Plaintiffs remain entitled to fees." He pointed out that "here, the first three factors – most notably the substantial public benefit from the released records – tilts heavily towards Plaintiffs, more than offsetting the fourth factor and confirming the news organizations' entitlement to fees." Boasberg then addressed the calculation of fees. While the coalition had recommended the higher rates in the LSI Matrix be used to calculate hourly rates, Boasberg decided to go with the USAO Matrix suggested by the agency. He noted that "to be sure, in many federal cases involving complex legal issues, the LSI Matrix may offer a better representation of the value of the legal services provided. It is clear, however, the burden lies with fee-seekers to demonstrate – through specific evidence – that their requested rates accord with those prevailing in the community for similar services from comparable lawyers. As Plaintiff have not discharged that burden here, the Court will base its award on rates found within the USAO Matrix, thus yielding a lodestar amount of $129,789 in attorney's fees." He agreed with the agency that the coalition's claimed hours were too high and reduced them by 5.17 percent. However, Boasberg found that the coalition had appropriately charged for hours spent discussing two related cases – one brought by the Center for Public Integrity, which was ultimately consolidated with Washington Post case, and the other brought in the Northern District of California addressing the same issues about access to PPP records. He noted that "the minimal time they spent to that effect, accordingly, was entirely appropriate." (*WP Company LLC, et al. v. U.S. Small Business Administration*, Civil Action No. 20-1240 (JEB), U.S. District Court for the District of Columbia, Jan. 21)

Judge Dabney Friedrich has ruled that the Department of Defense properly withheld records under **Exemption 5 (privileges)** for records in response to Judicial Watch's request to DOD and the Department of the Navy for records concerning the September 2015 request from then Marine Corps Commandant Joseph Dunford to then Navy Secretary Ray Mabus and then Secretary of Defense Ash Carter that exceptions be made to allowing women to serve in all Marine Corps occupational specialties. The agency disclosed ten documents in full and two documents with redactions. The agency also withheld in full seven documents totaling 29 pages, including two internal memoranda under the deliberative process privilege. Friedrich agreed with the agency's privilege claims. She noted that "there is no question that the memoranda predate any final decision about the implementation of the gender integration policy in the Marines Corps. Second, the documents are deliberative, as they 'reflect the give-and-take of the consultative process.' Indeed, Dunford submitted the memoranda with the very intent to influence the final policy as to the Marine Corps."

She pointed out that "Dunford submitted the memoranda to the Secretary before the Secretary had decided whether to grant the request for an exception to full gender integration, and Dunford did so with the intent to influence that decision." Friedrich found the agency had met its burden under the **foreseeable harm** standard. She observed that "the Department cites multiple foreseeable harms. . .By explaining the issue of gender integration in the military, the candid debate and analysis it produced, as well as the harm that would result from disclosing internal memoranda that raised concerns about the proposed policy, the Department has provided 'context or insight into the specifical decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure.'" Judicial Watch claimed that some of the material was factual and should not be considered deliberative. But Friedrich noted that "here, any factual materials were inextricably related to the Marine Corps' judgment about the advisability of the gender integration policy. The factual analysis was used to support the broader discussion of the topic, which informed the Commandant's position and eventual deliberations with the Secretary." (*Judicial Watch, Inc. et al. v. U.S. Department of Defense*, Civil Action No. 19-1384 (DLF), U.S. District Court for the District of Columbia, Jan. 27)

A federal court in Florida has ruled that the IRS **conducted an adequate search** for records concerning specific Private Letter Rulings that mentioned three named attorneys in the agency's Office of Chief Counsel's National Office. The court also found that the agency had, with exceptions, properly withheld records under **Exemption 3 (other statutes), Exemption 5 (privileges)**, and **Exemption 6 (invasion of privacy)** in response to a FOIA request from James Scott. Scott asked for any communications from Timothy Jones, Helen Hubbard, or Lewis Bell regarding any Private Letter Ruling request from August 2013 to May 2014. After determining that Jones, Hubbard, and Bell were attorneys in the National Office, the FOIA staff contacted the three attorneys and had them search their email accounts. None of the attorneys found any responsive records. Scott also provided five case numbers that could be responsive. A search of those numbers determined that only three case numbers were PLRs. Those cases files were searched. The searches yielded 255 potentially responsive pages, which were narrowed to 104 pages. The agency disclosed one page in full, 12 pages in part, and withheld 91 pages. Scott challenged the adequacy of the agency's search, but the Judge Kenneth Marra sided with the agency, noting that "the IRS has already adequately described why certain records were deemed non-responsive, and the Court rejects Scott's categorization of the order of review of the document and the large quantity of documents deemed non-responsive as 'suspect.'" The court added that "Scott has failed to rebut any facts material to whether the IRS's search was reasonable." The IRS withheld some records under Section 6103, which prohibits disclosure of records containing taxpayer return information. The court found some of the redactions made under Section 6103 did not constitute return information. The court observed that "the subject pages are not 'return information,' do not wholly consist of the name and other identifying return information of a third-party taxpayer and representative, and that this information is segregable." Turing to Exemption 5, Scott argued that withheld records were not predecisional. However, the court pointed out that "courts have consistently held that the *only* date relevant to determining whether a record is predecisional is the date that the decision was made." The court added that "the 'decision' at issue her is the final issuance of the PLR. All records being withheld either in full or in part reflect the 'opinions and recommendations of agency personnel that *preceded* the final issuance of the PLRs. Scott fails to demonstrate otherwise." The court also found the agency had articulated the **foreseeable harm** if records claimed under the deliberative process privilege were disclosed. The court noted that it was "aware that some of the redactions seem unusually broad" but indicated that the agency's affidavits "were sufficient to demonstrate a foreseeable harm." (*James E. Scott v. Internal Revenue Service*, Civil Action No. 18-8170-MARRA, U.S. District Court for the Southern District of Florida, Jan. 26)

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In a separate decision, a federal court in Florida has ruled that the IRS **conducted an adequate search** for records in response to a request from James Scott for Office of Chief Counsel Code and Subject Matter Directory in effect in 2013, communications from Jones, Hubbard, and Bell, and files regarding PLR 201502008 and properly withheld them under **Exemption 3 (other statutes), Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. One of the primary locations searched by the agency was the Office of Chief Counsel Library, which had access to historic versions of the OCC code and subject matter directories. The agency's searches yielded 826 pages of responsive records. The agency released 660 pages in full and 36 pages in part. The agency withheld 47 pages in part and 130 pages in full. Scott argued that the agency had not released any records he had requested that were subject to disclosure under 26 U.S.C. § 6110. Judge Kenneth Marra noted that "the fact the IRS did not release the PLR and any background file documents related to that PLR cannot demonstrate that the IRS's search was deficient. To be clear, at issue in this litigation is Scott's FOIA request, and not any previous request he has made under Section 6110. If Scott seeks to challenge the IRS's release of records under Section 6110, there is a separate mechanism for him to do so. Despite Scott's attempts to argue otherwise, it is not relevant to this suit what documents the IRS released under Section 6110, whether the IRS followed the proper procedure in releasing those records under Section 6110, and whether the IRS released all applicable records under Section 6110." Scott argued that Exemption 6 did not apply because the disclosure of much of the information that agency claimed would invade personal privacy was already in the public domain. Marra observed that "the fact that some of the information may exist in the public domain does not necessarily mean that the claimed exemption can no longer serve its purpose." He added that "rather, the burden is on the plaintiff to demonstrate that there is specific information in the public domain that duplicates the requested information." Marra found Scott had not provided any evidence to carry that burden. While the agency withheld 129 pages under Exemption 3, because he found the same records were protected under Exemption 5's deliberative process privilege, Marra decided not to analyze the Exemption 3 claims. Some of those privilege claims focused on draft documents. Marra noted that "not only would disclosure of these drafts disclose the IRS's decisions to insert or delate material to change the draft's focus or emphasis, but it would also inhibit frank discussion and stifle the decision-making process." (*James E. Scott v. Internal Revenue Service*, Civil Action No. 18-81742-MARA/MATTHEWMAN, Jan. 26)

A federal court in California has ruled that an IRS Form 706, which was attached to an allegedly fraudulent Form 709, is responsive to a request from Billie Mertes, who was contesting the authenticity of the fraudulent Form 709. Mertes had submitted a request for all documents related to the allegedly fraudulent Form 709, which is a gift tax form, while Form 706 provides information requested by Part1B of the Form 709's Schedule A. The IRS contended that only the Form 709 was responsive to Mertes' FOIA request and that once it disclosed the allegedly fraudulent Form 709, Mertes' suit became moot. The court looked at a series of cases dealing with whether email attachments were responsive to requests asking for emails more generally. After reviewing those cases, the court indicated that "the Form 706 is expressly referenced and relied upon in the Form 709 and provides information that is necessary to evaluate any gift tax that may be owed. Application of the rule regarding e-mails and their attachments lead to an obvious conclusion – the Form 706 and Form 709 in this case constitute a single record." (*Billie Mertes v. Internal Revenue Service*, Civil Action No. 19-1218 AWI SKO, U.S. District Court for the Eastern District of California, Jan. 25)

Judge Amit Mehta has ruled that Cato Institute researcher Patrick Eddington failed to show that 14 components of the Department of Defense **received** his FOIA request. Eddington emailed his requests to the FOIA acceptance email address as identified on the component's website. He made a PDF of each request, reflecting the date, time, and email address for each component, plus the request itself as an attachment. None of the emails bounced back and there were no other indications that the emails had failed. However, after Eddington filed suit, DOD indicated that none of the components had a record of having received his requests.

DOD told Mehta that standard agency practice in response to receiving a FOIA request was to send an acknowledgement by email. Eddington did not claim to have received an acknowledgment from any of the components. Nevertheless, Eddington argued that his record of having sent the requests was sufficient to place the burden of proof on the agency. Mehta noted that "while this evidence supports Plaintiff's genuinely held belief that he properly *sent* the FOIA requests, it does not create a genuine dispute of fact as to whether any DOD component *received* a request." Mehta observed that "the court agrees with Defendant that 'Plaintiff's evidence is equivalent to saving a copy of a letter and mailing evidence for a request sent via U.S. Mail.' Such evidence, without more, does not create a genuine dispute of material fact as to an agency's actual receipt of a FOIA request. This is particularly true here, where Plaintiff sent individual requests to fourteen different email addresses of fourteen different DOD components. The court finds it quite improbable that, if Plaintiff in fact sent that many separate requests, that at least one DOD component would not have located evidence of receipt or acknowledgment of receipt. That no DOD component found such evidence is strong, if not conclusive, proof of non-receipt, which Plaintiff cannot overcome with mere copies of his requests." Eddington argued that *Schoenman v. FBI*, 2006 WL 1126813 (D.D.C. 20006), held that a stamped envelope could show proof of transmittal. Mehta, however, disagreed, noting that "a copy of a stamped envelope, without more, would not suffice to overcome an agency's sworn declaration of non-receipt. A stamped envelope is, at most, proof of transmittal, it does not by itself create a genuine dispute of fact as to actual receipt." (*Patrick Eddington v. U.S. Department of Defense*, Civil Action No. 20-442 (APM), U.S. District Court for the District of Columbia, Jan. 25)

A federal court in Illinois has ruled that although the U.S, Marshals Service's had allowed prisoner William White's 2013 request to fall through the crackers, once the court brought the agency's delinquency to its attention, USMS finished processing the request four months later. Two FOIA specialists who were handling White's request resigned before finishing the processing of his request, while the USMS FOIA/PA Officer also died during that the period. Nevertheless, once the court notified USMS of its tardiness, "the USMS took immediate and extraordinary action to process White's request, including assigning two FOIA specialists – one third of its FOIA specialist staff – to White's case," resulting in disclosure of 1800 pages of records. The court was appalled at the agency's overall behavior, noting that "it is inexcusable that the USMS was unprepared for such foreseeable and regular complications as staff turnover, large numbers of requests, and the need for record review by other agencies before release. That it was able to marshal its resources and process White's request in four months makes the seven-year delay appear all the more egregious. The Court puts the USMS on notice that it must upgrade its FOIA processing protocols to avoid such delinquencies in the future. Indeed, future FOIA requesters should note this admonition and demand more from the agency in the future." White asked the court to award him costs for the agency's conduct. However, the court pointed out that "to the extent he arguably was a catalyst for the USMS's response to his 2013 FOIA request, that success was such a miniscule part of this litigation that White otherwise lost that the Court will not deem him to have substantially prevailed in the litigation as a whole." (*William A. White v. Department of Justice, et al.*, Civil Action No. 16-948-JPG, U.S. District Court for the Southern District of Illinois, Jan. 21)

Judge James Boasberg has ruled that the three agencies remaining in William Ball's FOIA litigation – the Department of Homeland Security, U.S. Marshals Service, and the Department of the Treasury – have now shown that they **conducted an adequate search** and properly withheld records under **Exemption 3 (other statutes), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. Ball, who is serving a federal sentence in Florida, requested records related to his conviction. The three agencies were the only ones remaining in Ball's suit. Boasberg noted that Ball had failed to file an opposition but indicated that under *Winston & Strawn v. McLean*, 843 F.3d

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503 (D.C. Cir. 2016), he was required to assess independently the government's case even without the plaintiff's participation. Here, he found that agencies had shown that their searches were adequate and that their exemption claims were appropriate. Boasberg noted that the Federal Victim and Witness Protection Act qualified as an Exemption 3 statute. He explained that "the statute prohibits the Government from disclosing documents in connection with a criminal proceeding that reveal 'the name or any other information concerning a child,' as well as information in those documents, 'that concerns a child.' Here DHS 'withheld names and other information about child victims and witnesses.' Its explanation of why this was appropriate in regard to child-pornography materials strikes the Court as appropriate and is not challenged." (*William B. Ball v. U.S. Marshals Service, et al.*, Civil Action No. 19-1230 (JEB), U.S. District Court for the District of Columbia, Jan. 26)