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Washington Focus: The New York Coalition for Open Government has urged New York Gov. Kathy Hochul to replace Shoshanah Bewlay, the current executive director of the state's Committee on Open Government, who was appointed by former Gov. Andrew Cuomo before he was forced to resign. Paul Wolf, the chair of the Coalition, noted that Bewley refused to issue an opinion on whether Cuomo should be required to release information about his $5.1 million book deal during the coronavirus pandemic. Wolf pointed out that "Bewlay as a Cuomo appointee chose to dodge Cuomo's denial of a FOIL request." Wolf's criticism comes at a time when Hochul is searching for candidates to serve on the Committee on Open Government.

Court Finds Agency Falls Short On Foreseeable Harm Claims

Judge Trevor McFadden has ruled that U.S. Customs and Border Protection consistently fell short on its foreseeable harm claims in a response to a FOIA request from the Reporters Committee for Freedom of the Press for records concerning the agency's 2017 attempt to force Twitter to divulge the identity of a user who had posted critical comments about the agency. In his ruling, McFadden makes clear that while the D.C. Circuit has addressed the level of detail needed to fulfill an agency's foreseeable harm requirements now in two cases – *Machado Amadis v. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020) and *Reporters Committee for Freedom of the Press v. FBI*, 3. F. 4th 350 (D.C. Cir. 2021) – there is still a considerable level of analysis that needs to be threshed out before agencies can routinely meet their obligations.

In March 2017, CBP's Office of Professional Responsibility issued a summons under authority allegedly provided by 19 U.S.C. § 1509 for records identifying the user of the Twitter account @ALT_uscis, which had been critical of CBP's policies. The summons was signed by Special Agent in Charge Stephen Caruso, ordering Twitter to appear before Special Agent Adam Hoffman. Twitter sued one month later, arguing that Twitter's request violated its First Amendment right. CBP withdrew the summons the next day.

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The Reporters Committee filed several FOIA requests for records involving the incident, including a request for the agency's notes pertaining to its processing of RCP's first request. Over a period of a year and a half, the agency disclosed 4,151 pages to RCP in 19 responses. The agency submitted a *Vaughn* index explaining its exemption claims under Exemption 5 (privileges), Exemption 6 (invasion of privacy), and Exemption 7(C) (invasion of privacy concerning law enforcement records). However, McFadden found the agency's *Vaughn* index so deficient that he ordered it to submit a new index. As a result of discussions between the parties, CBP released an additional 127 pages with revised redactions.

McFadden started by summarizing the findings of *Machado Amadis* and *Reporters Committee* concerning agencies' obligations under the foreseeable harm test. McFadden observed that "after *Amadis* and *Reporters Committee*, agencies must make two showings. *First*, the agency must, as always, show that a FOIA exemption applies to withheld information. *Second*, the agency must articulate in a 'focused and concrete' way, the harm that would result from disclosure, including the basis and likelihood of that harm. But even without a sufficient explanation from the agency, the 'context and purpose' of withheld information can support a finding of foreseeable harm. An agency's failure to make both showings warrants disclosure."

CBP withheld seven categories of documents under Exemption 5, citing the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege. He found a series of emails did not qualify for the deliberative process privilege because they were neither pre-decisional nor deliberative. While he found another series of emails might qualify under the privilege, he then pointed out that "CBP merely restates those broad justifications for the privilege. The harm that CBP identifies – the risk that agency officials might not seek guidance or share their views – undergirds the privilege in every case. And naturally, nondisclosure of officials' opinions is 'crucial' to the agency's efficacy; the object of the privilege is 'to enhance the quality of agency decisions by protecting open and frank discussion' among agency employees. CBP therefore says nothing new about the harm of disclosure and fails to link the possibility of that harm to the information in [the category]. Instead, the agency repeats the generic rationale for the deliberative process privilege, just as the FBI did [improperly] in *Reporters Committee*. Nor again does the context and purpose of these communications suggest a risk of foreseeable harm from disclosure."

McFadden observed in discussing the agency's shortfall in relation to another category that "the agency identifies no risk that would be specific to that context – the agency is concerned only with a lack of candor affecting agency decisions. Recall that this rationale undergirds the entire deliberative process privilege, and therefore cannot meet the independent foreseeable harm requirement identified in *Reporters Committee*. Nor do these communications concern anything like the undercover tactics used by the FBI in that case. Thus, the 'context and purpose' of the documents [in this category] does not make 'manifest' a risk of foreseeable harm from disclosure."

McFadden found the agency fared far better with its Exemption 7(C) claims. RCP argued that disclosure of the names of employees would provide insight into possible agency misconduct. However, McFadden indicated that "the Committee has not shown how that public interest outweighs the employees' privacy interest. 'The *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on the agency's performance of its statutory duties or otherwise let citizens know what their government is up to.' Knowledge of the employees' names would not matter here. The Twitter summons is already in the public domain, as is the Inspector General's report on how CBP used its summons authority in its dealings with Twitter. The Committee offers no suggestion as to how knowing names alone will clarify the agency's activities, particularly after public dissemination of the summons and the IG Report. The Court therefore finds that the agency properly invoked Exemption 7(C) for the names of almost all CBP non-public facing employees."

However, McFadden pointed out that Exemption 7(C) did not apply to the two named agency employees associated directly with the original summons. Here, he pointed out that "their names appeared on the Twitter summons and in the subsequent litigation. Their involvement with the summons therefore exists in the public domain, and CBP cannot withhold such public information under an otherwise valid exemption claim." (*Reporters Committee for Freedom of the Press v. United States Customs and Border Protection, et al.*, Civil Action No. 18-00155 (TNM), U.S. District Court for the District of Columbia, Oct. 18)

The Federal Courts…

The Tenth Circuit has ruled that because Friends of Animals had shown a public interest in disclosure of personally identifying information contained in records concerning the importation of African elephant skins and products from 2012 to 2018, including all Form 3-177s, that identifying information is not protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and must be disclosed by the Fish and Wildlife Services. However, by contrast, similar records pertaining to the importation of giraffe skins and products need not be disclosed because Friends of Animals failed to establish a public interest in the disclosure of the giraffe records. To import elephant or giraffe skins and products, importers must submit a Form 3-177 to FWS, including the date of shipment, port of clearance, names of the importer and exporter, species, quantity, monetary value, and permit numbers. FWS's Office of Law Enforcement enters the data unaltered into its Law Enforcement Management Information System. Friends of Animals submitted a FOIA request for records regarding the importation of African elephants and a second FOIA request for records, including Form 3-177s, of private citizens importing African giraffe parts or products through certain U.S. ports between 2014 and 2018. The agency disclosed 847 pages in response to the elephant request with redactions on 496 pages under **Exemption 6 (invasion of privacy)** and Exemption 7(C). In response to the giraffe request, the agency redacted the names of 373 individual importers, also under Exemption 6 and Exemption 7(C). Friends of Animals filed administrative appeals of both decisions. The agency upheld its decision regarding the giraffe request but failed to respond to the elephant request appeal. Friends of Animals then filed suit. In a 2-1 decision, the Tenth Circuit found that the agency had overvalued the privacy interest in withholding the records and undervalued the public interest in disclosure of the elephant records. FWS argued that hunters were subject to harassment, particularly on social media. Writing for the majority, Senior Circuit Court Judge David Ebel noted that "FWS [misses] the vital link connecting these news outlets and Internet posts to resulting harassment or threats targeted directly at the big-time hunters." Ebel also found persuasive the fact that participation in the permit program was voluntary. He pointed out that "obtaining a federal permit and complying with federal regulations is a known cost of receiving the benefit of participating in international wildlife trade, and there is a known risk of disclosure as a result of that voluntary but regulated participation." Ebel found a clear public interest in disclosure, observing that "by any measure, Form 3-177s serve as an important function in FWS's mission to 'conserve, protect, and enhance fish, wildlife, and plants and their habitats' by regulating the wild animal parts entering the country." Ebel reached the opposite conclusion on the giraffe records. Friends of Animals argued the importers' names were not compiled for law enforcement purposes. Noting that Form 3-177s helped the agency to monitor imports of African animal skins, Ebel disagreed, pointing out that "Form 3-177 is what allows FWS to make that determination of legality in the first place." He indicated that "because at the time the Form 3-177s were filed giraffe imports were not regulated in the same way that elephant imports were, we can identify no similar cognizable public interest that disclosure of the submitters' names in the Giraffe Request would serve." He added that "because the giraffe-import submitters' names cannot be

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linked to permits or permitting decisions, nor to FWS's duties to allow only a certain number of imports as in the elephant context, disclosure of the names would not aid the public's understanding of FWS operations." The Tenth Circuit also rejected the agency's **Exemption 4 (commercial and confidential)** because the agency's only supporting evidence came in the form of a hearsay affidavit. Ebel noted that "because FWS's primary evidence is that the withheld information 'is customarily kept private, or at least closely held, by the person imparting it,' the error was not harmless." (*Friends of Animals v. David Bernhardt, U.S. Fish and Wildlife Service*, No. 20-1182, U.S. Court of Appeals for the Tenth Circuit, Oct. 13)

A federal court in New York has ruled that the FBI properly invoked **Exemption 7 (D) (confidential sources)** to withhold records concerning its investigation of the killing of American journalist Steven Vincent in Basra, Iraq in 2005, including any information provided by Nour al-Khal, Vincent's Iraqi interpreter, in response to a FOIA request from Lisa Ramaci, Vincent's wife. Vincent and al-Khal were kidnapped from a public street in Basra by a group of men in police uniforms. The two were driven to the outskirts of Basra, where after six hours, they were driven to another location is Basra, thrown out of the car, told to run, and then shot multiple times. Although Vincent died, al-Khal survived. The FBI was charged with investigating the murder and closed its investigation in 2008. In 2016, Ramaci requested records about the Vincent investigation. The agency located 3,362 pages of potentially responsive records. Ramaci agreed to limit her request to obtain records responsive to another FOIA request for records pertaining to the investigation of Vincent's death and settled for a 116-page report containing the closing memorandum of the investigation. The FBI then reviewed 114 pages, released 89 pages in full or in part, and withheld 25 pages in full. After completing its response to Ramaci's request, the FBI disclosed 2,571 pages of responsive records, most of which were withheld under Exemption 7(D). Although the FBI did not identify those individuals who had allegedly provided confidential information, Ramaci assumed that a primary source for the investigation must have been al-Khal. She argued that because al-Khal had also been a victim of the crime, she could not also have been promised confidentiality as part of the investigation. Judge Ronnie Abrams disagreed, noting that "courts are similarly more willing to infer confidentiality where 'sources were close enough to the activities to provide detailed and singular information about them,' since such singular information, if disclosed, could be reasonably traced back to the source." As to whether al-Khal was assured confidentiality, Abrams pointed out that "here, the FBI persuasively notes, as a victim of the crime under investigation, al-Khal 'would have been in a unique position to provide assistance to investigators regarding the details of the attack on her and Mr. Vincent,' which would lead to 'a substantial risk that disclosure of any information she may have provided to the FBI would be easily traceable to her.'" Abrams added that "that al-Khal fled Iraq following the attack and has specifically articulated fear of returning to Iraq bolsters the conclusion that any information she may have provided the FBI would have been impliedly confidential." Ramaci argued that because al-Khal had publicly indicated in interviews that she had spoken to law enforcement she had waived any expectation of confidentiality. Again, Abrams disagreed. He noted that "the fact that the existence of a confidential conversation with law enforcement may have been disclosed hardly suggests that the substance of that conversation should not be public information." (*Lisa Ramaci v. Federal Bureau of Investigation*, Civil Action No. 17-10084 (RA), U.S. District Court for the Southern District of New York, Oct. 20)

Judge James Boasberg has ruled that the Department of Homeland Security, the U.S. Marshals Service, and the Department of Treasury have now shown that they **conducted adequate searches** and

otherwise properly responded to prisoner William Ball's FOIA request to multiple agencies for records concerning his conviction on child pornography charges. U.S. Immigration and Customs Enforcement located 47 pages, which it provided with redactions. The Marshals Service released 21 pages with redactions, while Treasury told Ball it found no responsive records. Ball argued that USMS's search was inadequate because it failed to search two databases he believed were relevant to the request. However, Boasberg indicated that "USMS maintains that there was no reason to search the [Prisoner Operations Division] database because Ball's request did not cover medical records, and he did not receive medical care in USMS custody. Even if USMS had those records, moreover, the agency notes that they would have turned up in [the Justice Detainee Information System, the database USMS did search]; in fact, the released documents indicate no medical treatment besides a recurring prescription. The court agrees and thus upholds USMS's search." ICE had claimed the Federal Victim and Witness Protection Act, which prohibits the disclosure of information concerning the identity of a child, to withhold records under **Exemption 3 (other statutes)**. Boasberg approved the withholding, noting that "ICE thus has complied with its statutory obligation to withhold names and identifying information about child victims." Turning to whether ICE had met the **foreseeable harm** standard, Boasberg observed that "given the foreseeable-harm requirement's recent vintage, precedents applying the required analysis to the exemptions at issue are relatively sparse." However, approving the foreseeable harm claims here, Boasberg indicated that "here, the agencies' statements in their declarations and the *Vaughn* Indexes have established foreseeable harm by 'connecting the harms in a meaningful way to the information withheld.' The agencies explain that releasing the personal identifying information of Government employees might subject them to harassment or public hostility." (*William B. Ball v. United States Marshals Service, et al.*, Civil Action No. 19-1230 (JEB), U.S. District Court for the District of Columbia, Oct. 19)

Judge Tanya Chutkan has ruled that federal prisoner James Cole **failed to exhaust his administrative remedies** concerning his request to the FBI for records pertaining to the investigation of a criminal organization known as the Junior Black Mafia or J.B.M. from January 1986 to January 1995. The FBI told Cole that it had located 43,750 potentially responsive pages, which it could release on CD at a cost of $1,310 for duplication. Since CDs could only be disclosed to Cole as a prisoner if he had alternate address, the agency also indicated it could disclose the responsive records in hard copy at a cost of $4,375 and that Cole was entitled to 100 free pages. Cole chose the 100 free pages and the agency disclosed records with redactions, indicating that Cole could appeal to the Office of Information Policy. However, Cole did not file an appeal but filed suit instead. The agency initially argued that the case was **moot** because it had disclosed 100 free pages. However, Chutkan noted that "defendants have not described the released pages, much less identified those to which the mootness doctrine may apply. Therefore, the motion to dismiss under Rule 12(b)(1) is denied." Chutkan agreed with the agency that Cole had not exhausted his administrative remedies. She pointed out that "plaintiff concedes that he did not appeal the FBI's release determination to OIP. He posits that his failure to exhaust is not a barrier to review because the agency failed 'to process' his request within twenty business days. Even if true, 'an administrative appeal is mandatory if,' as here, 'the agency cures its failure to respond within the statutory period by responding to the FOIA request before suit is filed.' The FBI's 'final release' of responsive records more than five years *before* the filing of this lawsuit undercuts Plaintiff's argument. Consequently, dismissal for failure to state a claim is appropriate." (*James T. Cole, Jr. v. United States Department of Justice, et al.*, Civil Action No. 21-1049 (TSC), U.S. District Court for the District of Columbia, Oct. 18)

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Judge Timothy Kelly has agreed to let three organizations **intervene** in a FOIA suit brought by the Humane Society International against the Fish and Wildlife Service for records in the agency's Law Enforcement Management Information System database that pertains to each organization. Kelly had previously ruled that FWS had failed to show that the requested records were confidential for purposes of **Exemption 4 (commercial and confidential)**. Kelly's original ruling finding that the records were not confidential for purposes of Exemption 4 was issued March 29, with an appeal deadline for May 28. Three organizations – the National Association for Biomedical Research, Primate Products, Inc. and Worldwide Primates, Inc. – indicated before the appeal deadline that they would seek intervention to defend the confidentiality of their submitted materials. Kelly agreed that all three organizations met the requirements for intervention by right. He pointed out that "the Court notes that courts routinely grant motions to intervene for the purpose of preventing disclosure of information under FOIA. . . That movants seek to intervene to appeal does not change the commonplace and straightforward nature of their request. Because Movants meet the criteria set forth in Ruled 24(a), the Court will grant both motions to intervene." (*Humane Society International v. United States Fish and Wildlife Service, et al.; National Association for Biomedical Research, Primate Products, Inc., and Worldwide Primates, Inc., Movants*, Civil Action No. 16-720 (TJK), U.S. District Court for the District of Columbia, Oct. 14)

Judge Royce Lamberth has ruled that a 16-member press coalition may have access to video taken by Eric Munchel and Lisa Eisenhart on their iPhones strapped to their chests as they participated in the attack on the Capitol on Jan. 6, 2021. While the video was to be introduced during their criminal trials, both Munchel and Eisenhart argued that the video should not be available for public dissemination outside the confines of their trials. Lamberth disagreed, noting that "the video exhibits in this case are judicial records and a strong presumption of public access attaches to them. Accordingly, the Court's decision as to when and whether the videos should be released is guided by the considerations in the six-part *Hubbard* test. Here, the Court finds that defendants' arguments are insufficient to overcome the presumption of access. The Court will thus order the release of the videos sought in the application." Lamberth concluded that "the presumption of access to the videos is not outweighed by any significant countervailing interests. The *Hubbard* factors strongly support not only 'access,' which defendants concede, but also 'release.' The right to public access includes the ability 'to inspect and copy' judicial records, so the court will permit the Press Coalition to 'record, copy, download, retransmit, and otherwise further publish' the videos as it requests." (*United States of America v. Eric Gavalek Munchel and Lisa Marie Eisenhart*, Case No. 21-cr-118-RCL, U.S. District Court for the District of Columbia, Oct. 8)

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