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Washington Focus: Sen. Ben Cardin (D-MD), Sen. Patrick Leahy (D-VT), and Rep. Jamie Raskin (D-MD) have introduced the Private Prison Information Act" (S. 3164 and H.R. 5853) to require private prisons, jails, and detention centers, including immigration detention facilities, to comply with the Freedom of Information Act. In introducing the legislation, Cardin observed that "the PPIA would create a baseline of accountability for private companies entrusted with the responsibility of caring for federal prisoners, inmates, and detainees. The reliance on private, for-profit facilities has increased rapidly in recent years, and it is essential that our transparency requirements keep up with that shift.". . . Both Robert F. Kennedy, Jr. and Patrick Kennedy have urged President Joe Biden to disclose all remaining records from the trove of secret documents on the 1963 assassination of President John F. Kennedy. Patrick Kennedy told POLITICO that citizens had a right to know about "something that left such a scar in this nation's soul that lost not only a president but a promise of a brighter future."

Reporters Committee Continues FOIA Winning Streak

The Reporters Committee for Freedom of the Press has continued an impressive winning streak in its FOIA suits against the government. Ruling in a case brought by the Reporters Committee against the Department of Justice – specifically the FBI, the Executive Office for U.S. Attorneys, and the Criminal Division – for records about the raid on freelance journalist Bryan Carmody's apartment in San Francisco by the San Francisco police in May 2019 as part of its attempt to uncover his source for an internal SFPD report concerning the death of San Francisco public defender Jeff Adachi, Judge Thomas Hogan found that all three components had failed to show that they conducted an adequate search for records.

After Carmody refused to divulge his confidential source, the SFPD conducted a raid on his apartment, seizing his computers, phones, work product, and other devices. While the SFPD conducted its raid, two FBI agents questioned Carmody. Carmody refused to speak with the agents and

identified himself as a journalist. The Carmody raid garnered considerable media attention. In its aftermath, Carmody successfully moved to quash the search warrants, arguing they were improperly issued in violation of the California shield law protecting journalists. In March 2020, San Francisco approved a $369,000 settlement to compensate Carmody for the illegal search and the seizure of his property. The RCFP submitted FOIA requests to the FBI, EOUSA, and DOJ's Criminal Division for records concerning Carmody. By the time RCFP filed suit, neither EOUSA nor the Criminal Division had provided any records, while the FBI redacted the names of the two FBI agents who questioned Carmody, citing Exemption 7(C) (invasion of privacy concerning law enforcement records).

Hogan first noted that the Justice Department has a News Media Policy that constrains the use of law enforcement with respect to journalists and mandates review and approval before questioning or seizing work product from members of the news media. He then addressed the RCFP's contention that all three components had failed to conduct an adequate search.

The FBI conducted a search of its Central Records System for main and reference records and located one reference record. It also conducted a search using Carmody's name as the keyword term, which yielded nothing. However, Hogan noted that the RCFP had also filed public records requests with the San Francisco police, which provided a number of responsive emails sent from the FBI email accounts of FBI Special Agents, including direct discussions of the Carmody raid.

Assessing the FBI's search, Hogan observed that "the CRS is an incomplete repository as it does not contain all potentially relevant email records. FBI personnel are not necessarily required to transfer 'transitory' or 'non-record' emails to the system. That a responsive record might be classified as 'transitory' or 'non-record' does not, however, absolve an agency of its duty to conduct a search reasonably designed to uncover such responsive records. That is, the FBI's classification of its own records does not affect its duties to search for responsive records under FOIA. Indeed, Plaintiff has affirmative proof that the FBI did not place a number of clearly responsive emails concerning Carmody in the CRS." The FBI argued that the fact that a specific document was not found did not demonstrate the inadequacy of the search. Hogan agreed in principle but noted that "the fact that responsive emails were found, in the exact location (the San Francisco Field Office) indicated in Plaintiff's request indicates that the search methodology was inadequate and not 'reasonably calculated to uncover all relevant documents.' When a request seeks information that was 'plainly not contained within CRS. . . the FBI could not put its head in the sand and ignore an obvious source for the requested material.'" Hogan also faulted the FBI's use of an index-only search. He noted that "in the context of RCFP's FOIA request, which sought email correspondence, text messages, and other electronic messages containing certain specific keywords, reliance on an index-only search cannot be 'reasonably expected to produce the information requested.'"

Hogan found the Criminal Division's decision to limit its search to its Policy and Statutory Enforcement Unit and its database, the Front Office Tracking System was too narrow. The Criminal Division explained that pursuant to the News Media Policy, federal law enforcement must consult with PSEU before initiating covered law enforcement interactions with journalists. Such consultations and requests to PSEU are tracked in the FOTS. However, Hogan indicated that if the News Media Policy had not been followed, records would not be in the PSEU. He then pointed out that "here, the facts suggest that the News Media Policy was not followed." He noted that "Carmody, a journalist, was questioned by the FBI – an activity that should have required approval – but there is no record of any authorization in the PSEU. Because the policy was seemingly not followed, the PSEU was not the unit most likely to house records concerning the decision to question Carmody, and a reasonable search would necessarily include other DOJ components." Hogan also observed that "Plaintiff sought communications concerning matters unrelated to the News Media Policy,

which could reasonably be stored outside the PSEU." He added that "a search limited to PSEU/FOTS would be unlikely to uncover documents responsive to these requests."

Hogan found EOUSA's search equally lacking. EOUSA explained that its liaison in the U.S. Attorney's Office for the Northern District of California had sent an email to all attorneys in the office to search their emails for records about Carmody. Finding that insufficient, Hogan noted that "in this case, a singular office-wide email that received no responses – not even a singular response confirming receipt – is not sufficient to meet an agency's obligations under the FOIA." He pointed out that "here, there is no indication that a search was ever conducted by the current NDCA Criminal Division attorneys because [the staffer who sent the email] did not receive any responses to her email. In response to a FOIA request, the agency must actually conduct a search of files likely to contain responsive documents. An agency's averment that it merely requested agency officials perform a search is inadequate."

Although Hogan chided the FBI for initially exempting the name of the FBI Special Agent who questioned Carmody after his identity was revealed in response to RCFP's request to the San Francisco police, he ultimately concluded that the identity of the second Special Agent, which had not been revealed publicly remained protected. Hogan noted that "the withholding here is simply a name of a singular rank-and-file FBI Agent – relatively little information." He pointed out that "the alleged government misconduct at issue in the Carmody matter has come to light (and may continue to be revealed after the relevant agencies fully search their records), and the public can – and has – engaged in scrutiny of the FBI without knowing the identity of the unknown agent." (*Reporters Committee for Freedom of the Press v. United States Department of Justice, et al.*, Civil Action No. 19-2847 (TFH), U.S. District Court for the District of Columbia, Nov. 8)

Views from the States…

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

Kentucky

A court of appeals has ruled that the Office of the Attorney General misinterpreted the legal issue at stake in a case involving a claim by Dr. Lachin Hatemi that the Healthcare Compensation Planning Committee, an ad hoc group of medical faculty advisors designed to provide assistance to the Dean of the Medical School on compensation issues, failed to create records of its meetings as required by the Open Meetings Act. Although Hatemi insisted that the committee was a public agency subject to the Open Records Act, the appeals court concluded that because the committee was not created under the authority of the university, it was not an agency subject to the ORA. When the university told Hatemi that it had no meeting records, Hatemi complained to the Attorney General's Office, claiming that because the committee was a public agency, its failure to keep meeting records violated the OMA. Instead of addressing the University's claim that it had no records, the Attorney General accepted Hatemi's assertion that the committee was required to maintain records and ordered the university to conduct an adequate search for the records. The court of appeals found that the Attorney General should have instead considered the university's claim that since the committee was not a public agency the university was not obligated to produce records that did not exist. However, when Hatemi filed suit against the university, the trial court tried to resolve the issue of whether the committee was a public agency. While it found that the committee was a public agency, it also concluded that the university had properly responded to Hatemi's request for records. After explaining its own reasoning, the appeals court noted that "we reverse the circuit court's order to the extent that it lacked subject matter jurisdiction to hold

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the 'committee' was a public agency as defined by [the statutes]. However, any determination by this Court whether the group of faculty advisors who advised the Dean was a public agency [under the statute] would be unnecessary, moot, or extra-jurisdictional dicta just as it was in the previous forums this case traversed." (*University of Kentucky v. Lachin Hatemi, M.D.*, No. 2019-CA-0731-MR and No. 2019-CA-0794-MR, Kentucky Court of Appeals, Nov. 5)

Pennsylvania

A court of appeals has ruled that the Pennsylvania State Police has not yet adequately explained why records withheld from the ACLU of Pennsylvania concerning its policies when using social media monitoring software. The court of appeals found the agency's affidavit explaining its need to withhold most of the information about the PSP's use of the software fell short. The court noted that "however, we recognize that an affiant may walk a fine line in attempting to offer sufficient specificity to describe such risks without effectively divulging the contents of the documents at issue." The court pointed out that "accordingly, in this instance, because additional development of the record is necessary, we conclude that PSP should be given a further opportunity to explain the nature and degree of the risks it claims are inherent in potential disclosure of the contents of AR 6-9." (*Pennsylvania State Police v. American Civil Liberties Union of Pennsylvania*, No. 1066 C.D. 2017, Pennsylvania Commonwealth Court, Nov. 17)

A court of appeals has ruled that the Pennsylvania Department of Health properly withheld records on the number of pneumonia and influenza deaths in the state for 2019-2020 because they consisted of personally identifiable health information. The records were requested by Nicole Brambila, who worked for PublicSource. Brambila also requested the death records for 2015-2018, which were publicly available. In withholding the 2019-2020 data, the court pointed out that "the Department established that the 2019 and 2020 information was still in raw form and not yet available for public access but declared that it would be made available once it was aggregated. Although the Department possessed the raw data from which 2019 and 2020 would ultimately be derived, the Department was strictly prohibited by the [Vital Statistics Act's] confidentiality provisions from disclosing the raw data to the Requesters." (*PublicSource and Nicole Brambila v. Pennsylvania Department of Health*, No. 1021 C.D. 2020, Pennsylvania Commonwealth Court, Nov. 9)

The Federal Courts…

Judge Trevor McFadden has ruled that a request made by the American Center for Law and Justice to the Department of Homeland Security was **overbroad** and, as a result, the agency need not respond to it. ACLJ requested all records on eight broad topics, including the number of migrants entering the United States with COVID-19 and how the agency was tracking them. After the agency failed to respond within 30 days, ACLJ filed suit. McFadden traced the rise of non-profit organizations as primary users of FOIA, noting that "according to Syracuse University's FOIA Project, nonprofits accounted for 56% of al FOIA lawsuits filed nationwide in 2018, compared to just 14.2% in 2001. And of those nonprofit plaintiffs, many are repeat litigants. From 2001-2018, plaintiffs with one FOIA lawsuit accounted for only 15% of all FOIA suits by nonprofits. The other 85% can be explained by nonprofit requesters who bring more than one FOIA lawsuit. The implication is clear: as more nonprofits file FOIA suits, some nonprofits file a disproportionated number of them." Reviewing the docket of the district court in the D.C. Circuit, McFadden explained that the ACLU had 12 pending FOIA cases, American Oversight had 74 active cases, Judicial Watch had 63 cases, while CREW had 27, the Center for

Biological Diversity had 15, and the Democracy Forward Foundation had 14 cases. McFadden indicated that nonprofits rarely had to pay fees for records and could recover attorney's fees. He noted that "both provisions encourage broadly worded requests. With no fees forcing a nonprofit to internalize the cost of its request, it would have little reason not to request a broader universe of documents." McFadden faulted ACLJ for asking for records "related to" its broad topics. He explained that "such expansive phrasing would sweep in any communication 'even remotely related to' the eight categories being requested." McFadden pointed out that "any search responsive to the plain language of ACLJ's request would require, at a minimum, a review of communications by 'any and all employees' at three agencies (ICE, CBP, and USCIS) that might be 'remotely related' to ACLJ's eight categories 'without any limitation on the method or form of communication.' And recall that all DHS employees would likely need to be included. That type of search would be 'unduly burdensome' and would be a 'massive undertaking.' The agency need not respond to such a request." ACLJ argued that its requests were more focused than requests that had been rejected in *Freedom Watch v. Dept of State*, 925 F. Supp.2d 55 (D.D.C. 2013). But McFadden indicated that "decisions from a district court do not create a floor for what a FOIA request must do to pass muster. To say that ACLJ's request is narrower than in another case does not answer whether ACLJ's request here meets FOIA's requirements." ACLJ argued that the agency could not unilaterally dismiss its request without first coordinating with the plaintiff to narrow the request. One provision in the 1996 EFOIA amendments does indeed require agencies to work with requesters to reformulate requests they find inadequate. But McFadden indicated that "nothing in FOIA requires such an action. That agencies have negotiated the scope of past requests does not graft a new requirement onto FOIA's express terms. ACLJ cites no authority to the contrary, nor is the Court aware of any." He concluded by noting that "ACLJ has not 'reasonably described' the requested records." He added that "ACLJ is the master of its request and instead chose to include broad language encompassing many other employees and documents." (*American Center for Law and Justice v. U.S. Department of Homeland Security, et al.*, Civil Action No. 21-01364 (TNM), U.S. District Court for the District of Columbia, Nov. 10)

A federal court in New York has ruled that the FBI properly responded to a request from Nathaniel Buckley, who, along with Leslie James Pickering, co-owned Burning Books, a bookstore in Buffalo specializing in social justice struggles and state repression, for records from the FBI, the Terrorist Screening Center, the National Joint Terrorism Task Force, or any Joint Terrorism Task Force referring to Nathaniel Buckley. The agency located 16 responsive records, releasing 14 records in full or in part. Buckley's attorney, Michael Kuzma, appealed the partial denial and provided privacy waivers for Pickering and his wife, John Buckley and Sarah Buckley, Daire Brian Irwin, Carrie Ann Nader, Sean Francis Raess, and Kuzma. The FBI conducted a second search and located 58 additional records, releasing 54 records in full or in part. Buckley challenged the **adequacy of the agency's search** as well as its exemption claims, particularly those under **Exemption 7 (law enforcement records)**, arguing that the FBI had violated subsection (e)(7) of the **Privacy Act**, prohibiting agencies from collecting and maintaining records reflecting an individual's exercise of their First Amendment rights. Magistrate Judge Leslie Foschio characterized Buckley's claim as dealing with "the investigation conducted by the FBI between 2012 and 2014, into Plaintiff and Pickering's possible involvement in eco-terrorism based on their activities at Burning Books was illegal because the activities being investigated consisted of guest speakers at events promoting social justice and the environment, as well as exposing the plight of political prisoners, all activities entitled to First Amendment protection." To overcome this hurdle, an agency must show that it has a legitimate law enforcement purpose in collecting and maintaining the records. Relying on the holding in the D.C. Circuit's decision in *PEER v. U.S. Section, International Boundary*

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and Water Commission, 740 F.3d 195 (D.C. Cir. 2014), Foschio observed that "the act of compiling records for law enforcement purposes 'requires only "that a document be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invoked the exemption."'" Foschio found that "in this instant case, the Plaintiff's own averments in support of summary judgment make clear the records Plaintiff seeks pertain to the FBI's investigation of political activists, including several particular political activities and journalist, as well as a defense attorney known for representing controversial defendants, who have appeared at Burning Books. This sufficiently establishes the records responsive to Plaintiff's FOIA Request were compiled for law enforcement purposes and was used in assisting law enforcement officials in the course of their duties, thereby satisfying the threshold for FOIA Exemption 7." Foschio agreed with the agency that the identity of one of the FBI special agents was protected by **Exemption 7(C) (invasion of privacy concerning law enforcement agencies)**. Foschio noted that "because the FBI has already revealed the substance of the investigation, knowledge of the names of the specific FBI Special Agents would add little, if anything, to the public's analysis of whether the FBI dealt with Plaintiff in an appropriate manner." Foschio also approved of the agency's use of **Exemption 7(D) (confidential sources)** to protect sources who had spoken confidentially to the FBI. (*Nathaniel J. Buckley v. U.S. Department of Justice*, Civil Action No. 19-319F, U.S. District Court for the Western District of New York, Nov. 18)

A federal court in Maryland has transferred FOIA litigation filed in Maryland to the District of Columbia after finding that one of the three plaintiffs does not have **standing** to file suit in Maryland because he is neither a resident nor does he have a place of business in the state as required under FOIA's **venue** provisions. DaJuan Holmes-Hamilton and Jeremiah Williams, both residents of Prince George's County in Maryland, submitted FOIA requests to the FBI for records concerning the unexplained deaths of their parents while vacationing in the Dominican Republic in 2019. The FBI denied their requests, citing **Exemption 7(A) (interference with ongoing investigation or proceeding)**. William Cox, whose mother also died while vacationing in the Dominican Republic, also requested records from the FBI. When the FBI failed to respond in a timely manner, Cox filed an administrative appeal with the Office of Information Policy, which told Cox that it would not rule on his appeal because he had not yet suffered any adverse determination. Cox, who was a resident of Tennessee, then joined the lawsuit filed in Maryland by Holmes-Hamilton and Williams. The agency argued that since Cox had no legal ties to Maryland, he was ineligible to file suit there under FOIA's venue requirement. The agency observed that the case could be transferred to the District of Columbia, where anyone with a FOIA claim can file suit. The court agreed, noting that "from a plain reading of the FOIA venue provision, it is clear that venue in this district is only proper as to Plaintiffs Holmes-Hamilton and Williams, who are residents of Prince George's County, Maryland. Plaintiff Cox does not reside in this district, and he does not allege that he has his principal place of business, or that Defendant's agency records are located here." The court pointed out that "plaintiffs urge that this Court 'can and should exercise jurisdiction over the Cox Plaintiff's claims,' despite FOIA's clear venue provision, because the requests and legal issues involved are 'substantially similar,' however, the Court is unaware of any authority showing that other courts have exercised pendant venue in a FOIA records action in a similar circumstance." The court indicated that "this Court agrees that Plaintiffs claims should remain together for the sake of judicial efficiency, this does not require the exercise of pendant venue over Plaintiff Cox's claims, when the statue provides a venue where all three plaintiffs can remain together: the District of Columbia." The court explained that "venue for all three Plaintiffs is appropriate in the District of Columbia, which explicitly provides for venue in the District of Columbia. Consequently, while this Court finds that venue as to Plaintiff Cox is improper, it declines to dismiss the action and instead orders that this case, in its entirety, shall be

transferred to the United States District Court for the District of Columbia. . .” (*DaJuan Holmes-Hamilton, et al. v. Federal Bureau of Investigation*, Civil Action No. GJH-21-00702. U.S. District Court for the District of Maryland, Nov. 5)

A federal court in California has ruled that two similar requests submitted to different components of the Department of Defense – one by NPR reporter Eric Westervelt to the U.S. Marine Corps and the other filed by NPR producer Graham Smith to U.S. Central Command – are sufficiently different that Westervelt's earlier request does not affect the processing of Smith's slightly later request. When NPR filed suit against the agency on behalf of Smith to force it to respond to his request to CENTCOM for records related to a friendly fire incident that took place in Fallujah, Iraq on April 12, 2004, the agency argued that because Westervelt had already filed a suit against DOD to force the Marine Corps to respond to his request for records about the friendly fire incident, Smith's suit was redundant and should be dismissed under the first-to-file rule, which Judge Michael Anello characterized as allowing a judge “to stay proceedings if a similar case with substantially similar issues and parties was previously filed in another district court.” Anello agreed that superficially the parties were similar – NPR was the plaintiff in both cases and DOD the defendant in both cases. But Anello pointed out that “here, the parties in both cases are not substantially similar.” He indicated that “in the Northern District Action, the U.S. Marine Corps FOIA program is responsible for the FOIA request. In the present case, CENTCOM, a different DoD component, is responsible for the FOIA request. Because the DoD designates separate components to respond to their respective FOIA requests, each DoD component in these two cases would thus be responsible for their respective FOIA requests.” DOD argued that there was some likely overlap between the requests, supporting dismissing the second case. But Anello observed that “though there could be overlap in production between the two FOIA requests, the extent to which the requests overlap is unknown. Moreover, the DoD FOIA handbook describes the types of records maintained by each component so each requested component may maintain different records. Furthermore, the search for information, determination of records to be released, and redaction of the records are left to the responding component of DoD.” (*National Public Radio, Inc., and Graham Smith v. U.S. Central Command and U.S. Department of Defense*, No. 21-1079-MMA (AHG), U.S. District Court for the Southern District of California, Nov. 10)

Judge Florence Pan has ruled that the Executive Office for U.S. Attorneys properly responded to five FOIA requests from Anthony Donato, a convicted member of the Bonnano crime family. Donato's requests focused on an alleged plot by inmate Dominick Cicale to frame a member of the Bonnano family and a BOP correctional officer for murder. The agency issued a *Glomar* response neither confirming nor denying the existence of records. Donato argued that any privacy interest had been waived because the Cicale plot was public knowledge and that, further, there was a public interest in knowing how the Department of Justice investigated the plot. Pan rejected Donato's claims. She noted that “prior disclosure of similar information by other entities does not suffice; instead, the specific information withheld via the *Glomar* response must already be public. In this case, that means that the unsealed documents from the BOP that describe the alleged Cicale plot and indicate an investigation into the scheme are not enough, for such documents do not establish that *the FBI* investigated the plot.” She pointed out that “here, however, Donato relies on documents which state only that the government investigated the alleged plot, not that the FBI investigated it. Where a disclosure by another agency merely acknowledges a government investigation, there is no basis to conclude that the FBI conducted

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that investigation." She noted that "plaintiff offers no evidence to support his apparent assumption that the FBI conducts all government investigations mentioned by other components of DOJ. Thus, Donato fails to establish that the FBI or any other government agency has publicly acknowledged that the FBI investigated the alleged Cicale plot, and that any information withheld via the FBI's *Glomar* response therefore must already be public." Pan also rejected Donato's public interest claim. She observed that the Supreme Court in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), required requesters to "produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred." She noted that "because Donato offers no such evidence, and because he simply reiterates his previous arguments, the Court is constrained to deny his Motion for Reconsideration." (*Anthony Donato v. Executive Office for United States Attorneys, et al.*, Civil Action No. 16-632 (FYP), U.S. District Court for the District of Columbia, Nov. 5)

The Seventh Circuit has agreed that the district court properly found that the FBI could answer white supremacist William White's massive FOIA requests by releasing responsive records on a 500-page-per-month schedule. The court pointed out that "to be sure, White's FOIA requests must be released 'promptly.' But FOIA does not define 'promptly,' and indeed it invites agencies to establish policies for equitably processing larger requests. And the FBI has held that large requests should be subject to a 500-page-per-month production rate. That kind of incremental-release schedule promotes efficiency and fairness by ensuring that the biggest requests do not crowd out smaller ones unless extraordinary circumstances warrant expedited production. We will not interfere with the agency's policy." White argued that his requests were in the public interest. The appeals court disagreed, noting that "White's pursuit is not of widespread interest; his principal aim is to cast doubt on his own criminal convictions by suggesting that he was entrapped or framed." (*William A. White v. United States Department of Justice, et al.*, No. 21-1229, U.S. Court of Appeals for the Seventh Circuit, Oct. 22)

Judge Tanya Chutkan has dismissed pro se litigatorIbrahim Elgabrowny's FOIA suit against the CIA and the Department of State after Elgabrowny failed to respond to the agencies renewed motions for summary judgement. Chutkan indicated that "to date, Plaintiff has neither complied with the court's June 10, 2020 Minute Order nor with the court's September 9, 2021 Order to Show Cause. All his deadlines have lapsed, and he has not opposed the pending Motion to Dismiss, requested an extension, or responded in any other manner. Plaintiff was last active in this case approximately 19 months ago. Despite time and opportunity, Plaintiff has not updated the court with his current address or any other contact information." Chutkan noted that "given Plaintiff's failure to comply with the court's directives and the Local Rules, and his lengthy period of inactivity, dismissal for failure to prosecute is proper." She observed that "despite the efforts of this court, Plaintiff has done nothing to suggest that he intends to continue with his remaining claims, and as such, they will be dismissed." (*Ibrahim Elgabrowny v. Central Intelligence Agency, et al.*, Civil Action No. 17-00066 (TSC), U.S. District Court for the District of Columbia, Oct. 27)

A federal court in New York has ruled that Wilfredo Torres **failed to exhaust his administrative remedies** for his FOIA request for records alleging his was the subject of surveillance by the CIA, who allegedly broke into his apartment in September 2015. Because Judge Ronnie Abrams' husband had formerly worked for Special Counsel Robert Mueller, Torres had filed complaints of corruption against Abrams. His FOIA request asked for records showing any connection between Mueller, the Department

of Justice, and the CIA agent who allegedly broke into his apartment and Torres' lawsuit. Judge Laura Taylor Swain dismissed the suit, noting that "here, Plaintiff alleges that he did not receive any records in responses to his requests. This allegation is insufficient to state a claim that the DOJ improperly withheld records, or that its search for records was inadequate. It is unclear from the allegations of the complaint whether, for example, the agency found responsive documents but withheld them based on an asserted exception to its disclosure, or whether the DOJ simply stated that it had no documents responsive to his request. Plaintiff's allegations thus fail to state a claim that agency records were improperly withheld." She added that "it is unclear if Plaintiff exhausted his administrative remedies. Plaintiff had 90 days to appeal the agency's adverse FOIA determination. He alleges that he appealed on August 6, 2021, and the agency has not responded. A FOIA requester is deemed to have exhausted his administrative remedies if he files a timely appeal but the agency does not respond within applicable limits. Plaintiff does not plead any facts about the agency's decision or the date it issued its decision. And it is thus unclear if Plaintiff's appeal to the head of the agency is timely. The complaint thus does not show the Plaintiff can be deemed to have exhausted his administrative remedies." (*Wilfredo Torres v. U.S. Department of Justice*, Civil Action No. 21-8427 (LTS), U.S. District Court for the Southern District of New York, Oct. 25)

Judge Florence Pan has ruled that Judicial Watch is not entitled to **discovery** in its suit alleging a common law right of access to all video footage – estimated by the U.S. Capitol Police at containing more than 14,000 hours of footage— shot in the Capitol Building during the Jan. 6, 2021, riot. Judicial Watch made the request to the U.S. Capitol Police, arguing that it had a common law right of access to the footage. When USCP opposed the request, indicating that the footage came from surveillance cameras that would normally be deleted after 30 days and that it had been preserved to aid in criminal prosecutions, Judicial Watch requested discovery on the issue of how the decision to preserve the video footage had been made. While allowing Judicial Watch's suit to continue, Pan rejected its request for discovery. She pointed out that "with respect to Plaintiff's request for discovery to support its argument that the public's interest in disclosure outweighs the interest in privacy, Plaintiff argues only that not all 14,000 hours of video footage contain secure and sensitive information. This argument can be made without access to additional facts. Plaintiff does not need to know the specific number of hours of footage that contain sensitive information to argue that any footage lacking such information should be disclosed. Therefore, Plaintiff again fails to establish that the requested discovery is essential to litigate the Motion for Summary Judgment." (*Judicial Watch, Inc. v. United States Capitol Police*, Civil Action No. 21-401 (FYP), U.S. District Court for the District of Columbia, Nov. 3)

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