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Washington Focus: According to POLITICIO, Steve Bannon, former campaign manager and advisor to former President Donald Trump, surrendered to the FBI Nov. 15 to face charges that he is in contempt of Congress for refusing to cooperate with the January 6 Committee's subpoena requiring him to testify before the committee and provide relevant documents. Bannon has argued that he is covered by Trump's claim of executive privilege, although that privilege resides with the current President Joe Biden, who has indicated he will not claim privilege for matters dealing with the January 6 assault on the Capitol Building.

Second Circuit Sides with D.C. Circuit On Privileged Status of Messaging Records

In a 2-1 split, a panel of the Second Circuit has ruled that the deliberative process privilege applies to messaging records discussing how an agency should respond to media or Congressional queries about an already decided upon policy as long as the records meet the traditional requirements for coverage by the deliberative process privilege – that they are pre-decisional and deliberative. Rejecting the finding of District Court Judge Jesse Furman of the Southern District of New York in a case brought by the Natural Resources Defense Council against the EPA that certain explanatory records did not deal with privileged policy-making decisions, Circuit Court Judge Steven Menashi, writing for the majority, found a series of rulings in the D.C. Circuit suggested that such a distinction was invalid.

The Second Circuit's decision brings it much closer to the current state of interpretation in the D.C. Circuit, where district courts judges have concluded that messaging records are subject to the deliberative process privilege. One case that both Menashi and Circuit Court Judge Raymond Lohier, writing in dissent, relied upon to support their opposing positions was *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350 (D.C. Cir. 2021), a recent decision by the D.C. Circuit that dealt in passing with whether records reflecting on already-made decisions qualified for the deliberative process privilege.

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The case began in 2017 when the NRDC requested records from the EPA concerning the activities of Dr. Nancy Beck, then the Deputy Assistant Administrator at the Office of Chemical Safety and Pollution Protection, specifically pertaining to her role in policymaking under the Toxic Substances Control Act and related pesticide matters. The EPA located 1,350 responsive records, disclosing 277 records in full but withheld the rest either in part or in full. The parties agreed to allow the EPA to provide a *Vaughn* Index describing 120 of the undisclosed records and providing justifications for the agency's exemption claims. Judge Furman ordered the agency to disclose 28 documents. Based on his earlier decision in *New York v. Dept of Commerce*, 2018 WL 4853891 (SDNY, Oct. 5, 2018), Furman found that the majority of those records were messaging records that "merely reflect deliberations about what message should be delivered to the public about an *already-decided* policy decision" and thus did not qualify for the deliberative process privilege. Furman also relied on Second Circuit precedents like *Tigue v. Dept of Justice*, 312 F.2d 70 (2nd Cir. 2002), for the proposition that the privilege applied only to records that both "relate to a specific decision facing the agency" and "formed an essential link in a specified consultative process." The EPA appealed his decision to the Second Circuit.

Menashi explained the NRDC's argument by noting that "the NRDC does not dispute that the messaging records 'were generated before the agency's final decision' regarding how to communicate and are thus 'predecisional" with respect to those communications decisions. Rather, the NRDC argues that an agency's decision about how to communicate its policies to people outside the agency does not generally involve the 'formulation or exercise of policy-oriented judgment' and that the deliberative process privilege therefore does not protect the EPA's internal discussions about how to formulate those communications."

Menashi indicated that he disagreed, pointing out that "an agency's decision regarding how to communicate its policies and actions to Congress, the public, and other stakeholders can have substantial consequences." He observed that "if an agency seeks to shape conduct through its policies, it must take care to explain those policies in ways that will elicit compliance. As it pursues its policy agenda, moreover, the agency must maintain consistency with the explanations it has previously provided or else risk losing credibility." He added that "an agency's communications decisions necessarily implicate the agency's policies and must be informed by those policies. Those decisions involve 'the formulation or exercise of policy-oriented judgment.' Because communications decisions involve 'the formulation or exercise of policy-oriented judgment,' deliberations about – and preceding – those decisions are protected by the deliberative process privilege."

Menashi turned to *New Hampshire Right to Life v. Dept of Health and Human Services*, 778 F.3d 43 (1st Cir. 2015), for support, a First Circuit opinion in which the court found that agency records reflecting internal deliberations on how the agency should communicate a decision with people outside the agency qualified for the deliberative process privilege. In a footnote, Menashi rejected the NRDC's claim that *New Hampshire Right to Life* was distinguishable because it dealt with the controversial topic of abortion. Instead, he noted that "such a standard is too subjective to provide the stable expectations that the deliberative process privilege requires, and indeed an issue might be 'incendiary' within the agency's specialized sphere of responsibility even if a court might not later recognize it as such." He also relied on the recent D.C. Circuit opinion in *Reporters Committee for Freedom of the Press v. FBI*, in which the D.C. Circuit found the discussion of an op-ed drafted for former FBI Director James Comey was protected. He pointed out that 'such a public statement, the court said, did not result from the sort of merely 'descriptive discussions' that do not warrant the protection of the deliberative process privilege. To the contrary, the deliberations over how to craft the agency's defense of the prior conduct contained 'the type of back-and-forth exchange of ideas, constructive feedback, and internal debate over how best to promote and to preserve the [policy] that sits at the heart of the deliberative process privilege.'" He observed that 'all in all, judicial precedent indicates that an agency exercises 'policy-oriented judgment' when communicating its policies to people outside the agency."

While Menashi found that most of the messaging communications were privileged, he returned seven documents to the EPA to provide a better explanation of why they were privileged. Giving the benefit of the doubt to the agency, he pointed out that "until now, our precedents had not provided clarity regarding what types of messaging records an agency may withhold pursuant to the deliberative process privilege. When the EPA prepared its *Vaughn* Index, it could have known the details that we would require to uphold its reliance of the privilege. Accordingly, the EPA should have the opportunity to explain its withholding decisions in light of the clarified standard."

Circuit Court Judge Raymond Lohier dissented on the issue of whether the messaging documents were privileged. He noted that "sometimes, messaging communications 'amount to little more than deliberations over how to spin a prior decision, or merely reflect an effort to ensure that an agency's statement is consistent with its prior decision.' When that is so, FOIA does not permit an agency to invoke the deliberative process privilege to avoid disclosure." He also cited *Reporters Committee* although he reached a somewhat different conclusion than did Menashi. Lohier pointed out that "agency deliberations over how to communicate and promote existing policies can, in fact, be merely a 'descriptive' exercise – as for example, when the agency seeks to explain a policy decision that is truly already settled rather than in flux. In my view, therefore, FOIA compels a flexible approach under which agency messaging records are not always or even presumptively protected by the deliberative process privilege." (*Natural Resources Defense Council v. United States Environmental Protection Agency*, No. 20-422, U.S. Court of Appeals for the Second Circuit, Nov. 29)

Views from the States…

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

Pennsylvania

A court of appeals has ruled that the Office of Open Records did not err in determining that the Pennsylvania Interscholastic Athletic Association constituted a public agency subject to the Right to Know Act and that, as a result, PIAA failed to conduct an adequate search for records requested by Simon Campbell. Campbell requested electronic records concerning PIAA's legal and financial records. PIAA argued that it was not a public agency and, thus, not subject to the RTKL. Campbell filed a complaint with the Office of Open Records, which found that PIAA was subject to the RTKL, but that it had not acted in bad faith in arguing that it was not subject to the open records statute. However, OOR ordered PIAA to provide the records requested by Campbell. Ruling in favor of Campbell and the OOR, the appeals court noted that "PIAA's statewide control over high school athletics and the connection between the funds it receives from its members and the Commonwealth's taxpayers is sufficient such that its classification as a 'state-affiliated entity' for purposes of the RTKL is reasonable." The appeals court also found that PIAA's legal invoices were likely to contain some privileged information. The court pointed out that "to the extent the legal invoices currently exist in electronic format, PIAA is directed to produce the redacted legal invoices to Requester with an accompanying privilege log explaining why a privilege applies to each redacted entry." (*Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.*, No. 25 C.D. 2021, No. 107 CD. 2021, and No. 170 C.D. 2021, Pennsylvania Commonwealth Court, Nov. 30)

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The Federal Courts…

The D.C. Circuit has ruled that portions of Mueller Report were properly redacted under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** but that other portions that do not contain stigmatizing personal information should have been disclosed in response to requests from EPIC and BuzzFeed journalist Jason Leopold for an unredacted version of the Mueller Report. The Department of Justice consolidated requests submitted by EPIC and Leopold. The district court found some records were protected under **Exemption 3 (other statutes)**, citing Rule 6(e) on grand jury secrecy, that intelligence sources were properly withheld under **Exemption 1 (national security)** and Exemption 3, relying on the National Security Act, and that law enforcement and privacy information was protected by **Exemption 6 (invasion of privacy), Exemption 7(A) (interference with ongoing investigation or proceeding), Exemption 7(C)**, and **Exemption 7(E) (investigative methods or techniques)**. Only BuzzFeed appealed the district court's decision and the only issue remaining was the application of Exemption 7(C), specifically the district court's finding that BuzzFeed had not shown a public interest in disclosure about four pieces of information – (1) information about the decision not to prosecute an unnamed individual whose identity was likely Donald Trump Jr. for campaign finance violations; (2) information about several people who were investigated for false statements and obstruction but not charged, (3) information about declination decisions that appeared to relate to contacts between the Russian government and the Trump campaign, and (4) information about decisions not to charge Trump campaign officials with foreign agent offenses. BuzzFeed did not contest that the individuals had cognizable privacy interests under Exemption 7(C). Instead, it focused on the fact that most of the individuals were well-known to the public. However, writing for the D.C. Circuit, Circuit Court Judge Karen LeCraft Henderson pointed out that "of the individuals whose privacy interests may be jeopardized by disclosure of the requested information, only one is a public official. The remaining individuals are private citizens who served on a presidential campaign. BuzzFeed's counsel could not identify [a court case] that held that a private citizen's personal privacy interests are diminished merely by virtue of his service on a presidential campaign." BuzzFeed also argued that individuals' privacy interests were diminished because they were named in the report. But Henderson indicated that "'the *fact* that an individual was under investigation' is distinct from the 'privacy interest in the *contents* of the investigative files.'" Henderson found that the privacy interests in the declination decisions was considerably less. She noted that "the redacted passages contain no new facts; they contain no new information or descriptions of conduct that have not been made public elsewhere in this very Report." Whereas the district court had not found that BuzzFeed had identified a public interest that would tip the balance in its favor, Henderson indicated the appeals court concluded that BuzzFeed had identified a public interest in learning whether the Special Counsel had properly investigated and reached proper declination decisions. She noted that "the redacted material covers how the Special Counsel carried out his duties to investigate and prosecute criminal conduct. This public interest suffices to tip the balance in favor of disclosure. . ." Henderson found BuzzFeed had shown a public interest, noting that "the fact that the Special Counsel's legal analysis that led to the declination decisions has not been released and likely would 'contribute significantly to public understanding of the operations or activities of the government.'" (*Electronic Privacy Information Center, Jason Leopold and Buzzfeed, Inc. v. United States Department of Justice, et al.*, No. 20-5364, U.S. Court of Appeals for the District of Columbia Circuit, Nov. 30)

A federal court in New York has ruled that U.S. Immigration and Customs Enforcement failed to **conduct an adequate search** for records requested by the Brennan Center for Justice and that while some its **Exemption 7(E) (investigative methods or techniques)** are justified, others are not. The Brennan Center submitted a two-part FOIA request to ICE. Part One requested five specific Homeland Security Investigations handbooks; Part Two sought any memoranda or materials meant to explain the policies behind, or to guide agents in implementation of the handbooks. After the Brennan Center filed suit, ICE conducted a search and withheld one page in full and 189 pages in part under **Exemption 5 (privileges)** and Exemption 7(E). The Brennan Center informed the agency that it believed the agency had interpreted Part Two too narrowly and that other records should exist. The agency located an additional 110 pages, disclosing 32 pages in full and withholding 78 pages under Exemption 5 and Exemption 7(E). The initial search was conducted by the National Program Manager, who searched HSI Net for each handbook identified in the request and located 245 pages of potentially responsive records. After the Brennan Center told the agency that its initial search was too narrow, the agency conducted a second search of three divisions within HSI which use and implement the handbooks identified in Part One. That search yielded an additional 21 documents that were provided to the Brennan Center. After the Brennan Center identified a passage in a record already released suggesting that the National Security Legal Division conducted training on the handbooks, an additional five legal advisors who covered the areas identified in the handbooks, searched their email accounts. That search located no further records. Judge Jed Rakoff found the agency's searches were insufficient "because [they] did not comport with the actual terms of the Brennan Center's request. ICE was required to construe Part Two of the request 'liberally.' Instead, ICE read it narrowly. Part Two of the Brennan Center's request seeks 'any memoranda or training materials . . . that purport to explain the policies behind, or guide agents in implementation of' the handbooks requested. The language of 'the policies behind' the handbooks seeks on its face more than materials explicitly referring to the handbooks' titles set forth in Part One. ICE was required to construe the Brennan Center's request liberally and to interpret Part Two in the way that would be likely to produce the greatest number of responsive documents." Rakoff also faulted the agency's search for failing to use clearly relevant terms. He pointed out that "a single-term search for only the name of the handbook is an inadequate search, without, at a minimum, searching for a relevant acronym, short title, or keyword phrase." Rakoff added that "the disparity between the search terms used by various sections also indicates that the search was inadequate where some divisions failed to use what other divisions deemed clearly relevant search terms. . ." ICE argued that Rakoff was improperly faulting ICE's judgment as to where to best search for responsive records. Rakoff pointed out that "the fact that an affidavit contains sufficient detail describing a search is not a legal conclusion that the search was adequate; to the extent the declarations rely on simply stating in conclusory fashion that an officer used his or her 'judgment' to conduct an adequate search, such a statement is of no use to the Court. The adequacy of the affidavits concerns whether they provide sufficiently detailed descriptions of the underlying facts. . ." While he upheld some of the agency's Exemption 7(E) claims, Rakoff rejected others. Rejecting one, he noted that "the redactions are simply a list of tools rather than specific instructions for how, when, and why to use such tools. Since material withheld under Exemption 7(E) must 'truly embody a specialized, calculated technique or procedure' that should not be apparent to the public, the redaction [in this section] do not qualify." (*Brennan Center for Justice at New York University School of Law v. U.S. Immigration and Customs Enforcement*, Civil Action No. 21-2443 (JSR), U.S. District Court for the Southern District of New York, Nov. 29)

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Judge Emmet Sullivan has ruled that the CIA properly withheld records in response to a FOIA request from the ACLU concerning the agency's prepublication review process under **Exemption 1 (national security)** and **Exemption 3 (other statutes)** but rejected the agency's claim that personally identifying information was protected by **Exemption 6 (invasion of privacy)**. The ACLU sent the same request to 19 agencies and the CIA's claims were the only ones remaining when Sullivan ruled. The CIA had responded to the ACLU's request by releasing nine documents in full, 20 documents in part, and withheld seven documents in full. However, the ACLU challenged only a single withholding – the redaction of the names of several CIA employees based on Exemptions 1, 3, and 6. The CIA argued that the redacted names were those of current covert officers. However, the ACLU argued that the names were those of former employees whose identities had been revealed, specifically on an unclassified internal blog. Sullivan rejected the claim, noting that "the CIA responds – and the Court agrees – that the intra-agency dissemination of information does not amount to making the information 'public through an official and documented disclosure.'" The CIA also withheld the names under the CIA Act of 1949. Again, the ACLU argued that the agency had failed to show that the names had not been public. But Sullivan indicated that "the CIA employee's publication of a book disclosing the employee's affiliation with the CIA does not satisfy the requirement that the disclosure be 'official and documented.'" However, Sullivan rejected the agency's claim that the names were protected by Exemption 6. He pointed out that "the CIA has not explained why disclosing the list of CIA employees could subject them to harassment nor who would harass them." He added that "where the affidavit supporting an exemption is conclusory, courts will provide the agency with the opportunity to submit a supplemental affidavit with revised declarations or affidavits to explain in more detail the privacy interest the published authors have in their names. Because the Court has already concluded that the names are withheld pursuant to Exemption 1 and Exemption 3, and according will not be disclosed, the Court need not provide the CIA with the opportunity here." (*American Civil Liberties Union, et al. v. Central Intelligence Agency, et al.*, Civil Action No. 16-1256, U.S. District Court for the District of Columbia, Nov. 24)

Judge Florence Pan has ruled that prison litigator Dennis Bolze has not shown that the Department of Justice **failed to conduct an adequate search** for records concerning his conviction on wire fraud and money laundering charges in Tennessee in 2009. Bolze requested the records from the Criminal Division and the Eastern District of Tennessee. The Criminal Division referred his request to the FBI, which located 2,303 pages of potentially responsive records. Bolze agreed to pay $125 in fees, requesting paper format. He also indicated that he still sought copies of all bank statements for Centurion Asset Management but no longer sought copies of any canceled checks. The FBI then informed him that it had located 6,003 pages of potentially responsive documents. Bolze did not understand how the records responsive to his request had nearly tripled, particularly after he had narrowed the request. The FBI had apparently failed to acknowledge or respond to his prior attempt to narrow the scope of the search. After Bolze sent another letter explaining his search concerns, the FBI began to send Bolze 500 pages monthly. The agency processed 5,940 responsive pages, disclosing 2,839 pages in full, and 2,100 in part. The agency withheld 1,001 pages in full, citing **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. While Bolze claimed that 2,700 pages were non-responsive, more than 2,000 pages were responsive. A search of the Eastern District of Tennessee yielded no pages. Nevertheless, Pan agreed that the FBI's search was adequate. She noted that "the efforts described by [the agency's affidavit] were plainly adequate: They not only were 'reasonably likely' to locate records responsive to Bolze's request, but they did, in fact, locate all the relevant records." Pan pointed out that "the FBI performed a search that located the requested records. Moreover, Bolze's own search preferences cannot dictate the reasonableness of the scope of an agency's FOIA

search." Bolze also faulted the agency's search for providing too many records. However, Pan noted that "the apparent argument that Bolze received *too many records* is incongruous in the context of a FOIA request; and the claim contradicts his contention that the search was insufficient. If anything, Bolze's argument suggests that he received a more complete view of his investigative file than was warranted by his request. Thus, even if the FBI mishandled Bolze's request, the asserted error did not prevent Bolze from receiving appropriate documents." Bolze also complained that the Eastern District of Tennessee should have had responsive records. But Pan pointed out that "Bolze ultimately received the requested documents from the FBI. Even assuming *arguendo*, that the USAO-EDTN also once possessed the documents, the FOIA does not impose a duty on agencies to keep these records indefinitely, and a requester is only entitled to records that an agency has actually retained." (*Dennis Roger Bolze v. Executive Office for United States Attorneys, et al.*, Civil Action No. 17-2858 (FYP), U.S. District Court for the District of Columbia, Nov. 29)

A federal court in California has ruled that the U.S. International Development Finance Corporation failed to justify its **Exemption 5 (privileges)** claims to withhold records concerning a failed attempt to loan Eastman Kodak $765 million so that the company could manufacture ingredients for COVID-19 drugs. After the deal fell through, NPR producer Tom Dreisbach filed a FOIA request for three categories of records related to the loan to Kodak. The agency withheld records under the deliberative process privilege, including an op-ed the agency published in the *New York Post* announcing its loan to Kodak. NPR argued that the op-ed was not predecisional. The court agreed, noting that "here, DFC's draft op-eds do not aid it in making any policy decisions and are therefore not 'predecisional' for purposes of the deliberative process privilege." The agency argued that the draft op-eds *should* be subject to the deliberative process privilege. But the court pointed out that "in light of *Lahr* and *Maricopa Audubon Society*, courts in the Ninth Circuit have repeatedly reached the opposite conclusion, finding that it is only when the agency is deliberating *substantive policy decisions* that the deliberative process privilege applies and refusing to apply the privilege when the deliberations do not proceed policymaking." The court added that "DFC cites to other courts, many of them in the D.C. Circuit, that regularly exempt from FOIA disclosure requirements agency documents related to public messaging. To the extent there is a split of authority between the Ninth Circuit and the D.C. Circuit, this Court should follow the circuit by which it is bound. In this circuit, the purpose of the deliberative process privilege is not to protect government information in general but to protect 'frank discussion of legal or policy matters' in particular from public disclosure. By DFC's own admission, the documents in [dispute] had nothing to with the process of formulating a policy or decision within DFC's purview; they had to do with deciding how to announce a policy decision already made. In the Ninth Circuit, this observation is fatal to the viability of the deliberative process privilege, and FOIA therefore mandates disclosure of these documents." Addressing another category, the court found not only that the deliberative process privilege applied but that the agency had justified its **foreseeable harm** claims. The court observed that "DFC can make better policy when its employees are free to bring topics to their policymaking meetings for discussion and deliberation without fear that the unpolished, unvetted results of their efforts will one day be open to public scrutiny. In describing these two agendas and the harm that would result from disclosure, DFC makes a sufficient showing of foreseeable harm." (*National Public Radio, Inc. v. U.S. International Development Finance Corporation*, Civil Action No. 20-08307-ODW(JCx), U.S. District Court for the Central District of California, Nov. 24)

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A federal court in Illinois has ruled that the U.S. Army Corps of Engineers failed to justify its claims made under **Exemption 5 (privileges)** to withhold two disputed records involved in FOIA litigation brought by Lewis Mocaby for records concerning an incident in which Mocaby sustained injuries caused by the negligence of Aecon Energy and Construction while welding a pipe as part of construction on the renovation of the Olmsted Dam in Pulaski County, Illinois. Mocaby and his co-workers had finished welding the pipe while on a barge. When the boat operated by Aecon passed the barge, the pipe assembly fell and struck Mocaby causing him injuries. Mocaby filed a FOIA request for an unredacted copy of the Army's Board of Investigation report concerning his injuries. The agency disclosed the report, with redactions under Exemption 5 and Exemption 6 (invasion of privacy). When the court ruled, the only remaining disputes concerned two privilege claims – one made under the deliberative process privilege and the other made under the *Machin* privilege, which protects the testimony of airplane crash witnesses from disclosure. The court found the agency had failed to justify either claim. As to the deliberative process privilege claim, the court noted that "the only redacted portion of the document is a single sentence regarding the direct cause of the accident. The sentence states the factual events which led to the accident and describes the injury which occurred. However, the sentence does not contain an opinion regarding what caused the factual events directly preceding the injury, nor does it contain analysis regarding how those events could be prevented in the future." The court observed that for the redacted sentences "there is no 'give and take' contributing to the consultative process." However, the court found the agency had satisfied its deliberative process privilege claims as to other portions of the report. As to the *Machin* privilege, the court pointed out that "the privilege applies only in cases concerning Air Force accidents or at the very least incidents involving military aircraft." The court explained that it had reviewed the documents *in camera* and pointed out that "an *in camera* review of the documents at issue reveals that these documents do not contain deliberations or recommendations regarding appropriate policies to pursue as required under the second *Machin* prong." The court added that "it does not include deliberations or recommended actions the Government should pursue." (*Lewis Mocaby v. United States of America, United States Army Corps of Engineers, et al.*, Civil Action No. 19-00580-GCS, U.S. District Court for the Southern District of Illinois, Nov. 24)

A federal court in New York has ruled that the ACLU has not shown that it is entitled to **expedited processing** of its request to U.S. Immigration and Customs Enforcement for records concerning the agency's purchase and use of cell phone location data. ICE agreed to process the request at a rate of 500 pages per month, but the ACLU asked Judge Paul Gardephe to increase that rate to 1,000 pages per month. Gardephe indicated that even the cases cited by the ACLU to justify the faster production rate really did not support its case. He noted that "although the ACLU asserts that a higher processing rate was specified in these cases because they involved matters of 'significant public interest, each case involved factors not present here." The ACLU also asked Gardephe to order ICE to refer its request to the Secret Service and the Coast Guard, Homeland Security components that the ACLU believed might have responsive records. Instead, ICE argued that the ACLU should submit a new request. This time, Gardephe sided with the ACLU. He observed that "DHS's implementing regulations concerning FOIA provide that DHS will forward FOIA requests to DHS component offices that are likely to have responsive records. The regulation makes no exception for the Secret Service and the Coast Guard, and DHS has offered no justification for this Court to ignore the applicable DHS regulation." (*American Civil Liberties Union v. United States Department of Homeland Security, et al.*, Civil Action No. 20-10083 (PGG), U.S. District Court for the Southern District of New York, Nov. 19)

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