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Washington Focus: In her article entitled "Secrecy Creep," Christina Koningisor writes about the movement of the Glomar response neither confirming nor denying the existence of records from its origins in a national security exemption case involving the CIA's use of the Howard Hughes produced Glomar Explorer to locate a sunken Russian submarine to withhold law enforcement records at the state and local government level. Koningisor writes that "for a time the secrecy tool remained tethered to the national security state. But eventually, it began to migrate – first to other federal agencies and then to state and local governments. Police departments, especially, began to issue Glomars to shield information relating to their investigations. Over time, its use became more widespread, even routine."

D.C. Circuit Finds Travel Ban Emails Not Deliberative

A recent decision by the D.C. Circuit shows that when agencies try to shield even politically charged discussions from disclosure, the government still needs to show that the withheld materials were truly privileged in order to withhold them under the deliberative process privilege. Ruling in a case brought by Judicial Watch to gain access to four email attachments from then Acting Attorney General Sally Yates concerning whether she would defend the newly announced Muslim travel ban, the D.C. Circuit reversed the district court's decision accepting the privilege claim, finding instead that the Department of Justice had failed to show that the attachments were deliberative.

One week after taking office in January 2017, then President Donald Trump issued Executive Order 13,769 suspending entry into the United States of foreign nationals from seven majority-Muslim countries. On January 30, Acting Attorney General Sally Yates issued a four-paragraph statement declaring that "for as long as I am the Acting Attorney General, the Department of Justice will not present arguments in defense of the Executive Order unless and until I become convinced that it is appropriate to do so." Trump fired her later that day. Two days later, Judicial Watch filed a FOIA request for the attachments to four emails sent to or from

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Yates' DOJ email account on the same day she issued her statement. DOJ declined to release the attachments, citing the deliberative process privilege as the basis for its exemption claim. The district court ruled in favor of the government and Judicial Watch appealed to the D.C. Circuit.

Writing for the D.C. Circuit, Circuit Court Judge David Tatel began by indicating that Congress had amended FOIA in 2016 in part because of its concern that government agencies were abusing the deliberative process privilege. Tatel observed that "concerned that the government was overusing the privilege, Congress passed the FOIA Improvement Act of 2016, which prohibits an agency from withholding information unless it 'reasonably foresees that disclosure would harm an interest protected by an exemption' or if 'disclosure is prohibited by law.'"

Turning to Judicial Watch's request, Tatel explained that DOJ produced some documents but redacted or withheld others. "Among the documents withheld were four attachments to four January 30, 2017 emails sent hours apart from one another. The first of the attachments, titled 'draft.docx,' was attached to an email sent from Deputy Attorney General Matthew Axelrod to Yates at 8:41 a.m. The second, titled 'Draft2.docx,' was attached to an email from Axelrod to Yates sent at 1:44 p.m. The third and fourth, also titled 'Draft2.docx,' were attached to emails bearing the subject 'Draft2' that Yates sent from her government to her personal email account at 2:58 p.m. and 5:27 p.m. The emails contain no other substantive information."

At the district court level, the court initially denied DOJ's motion for summary judgment because it found the agency had not satisfied the requirements of the foreseeable harm standard. After DOJ submitted a further affidavit, the district court agreed it had met the foreseeable harm standard. The district court found the documents were both predecisional and deliberative because they "reveal the drafters' evolving thought-processes regarding the Executive Order' and were transmitted directly between Ms. Yates and one of her principal aides.'"

Tatel agreed that the attachments were predecisional. To support its claim that the records were also deliberative, DOJ's affidavit explained that "these documents reflect successive versions of working drafts, and as such, show the internal development of the Department's final decisions. . . The disclosure of the drafts of [Yates'] statement would reveal the drafters' evolving thought-processes regarding the Executive Order, as well as ideas and alternatives considered but ultimately rejected in the final agency decision.' DOJ argues that the attachments are drafts and that our court has 'repeatedly held that "drafts of what will become a final document" are privileged and exempt from compelled disclosure.'"

Tatel found the agency's affidavit did not support its claim that the emails were deliberative. Tatel pointed out that the agency's affidavit "tells us that disclosing the attachment would 'reveal the drafters' evolving thought-processes' as well as 'ideas and alternatives considered but ultimately rejected.' But it never explains why." He observed that "it tells us nothing about what 'deliberative process privilege is involved,' that is, what procedure DOJ followed to finalize Acting Attorney General Yates' statement. The declaration tells us nothing about the 'role' the attachments played 'in the course of that process.' And it tells us nothing about the 'nature of the decisionmaking authority vested in the officer or person issuing the disputed document' or the 'relative positions in the agency's chain of command occupied by the document's author and recipient.' It never even identifies who prepared the attachments or to whom the attachments were addressed. We know the attachments were emailed to Yates only because Judicial Watch entered that information into the record."

Tatel compared the lack of details in the DOJ affidavit with explanations the D.C. Circuit had found persuasive in *Machado Amadis v. Dept. of State*, 971 F.3d 364 (D.C. Cir. 2020). Tatel pointed out that "unlike here, the agency explained the role played by the withheld material in the course of [the deliberative] process."

He noted that "and unlike here, the agency described the nature of the decision-making authority vested in the drafters of the withheld material as well as their positions in the chain of command relative to the recipients of that material." He added that 'unlike here, there is little mystery as to the 'who,' 'what,' 'where,' and 'how' of the deliberative process and the role played by the withheld material."

Tatel also rejected DOJ's reliance on the recent Supreme Court decision in *U.S. Fish and Wildlife Service v. Sierra Club*, 141 S. Ct. 777 (2021). He pointed out that "*Sierra Club* was about determining whether the drafts were predecisional, not whether they were deliberative, the issue in this case." (*Judicial Watch, Inc. v. United States Department of Justice*, No. 20-5304, U.S. Court of Appeals for the District of Columbia, Dec. 10)

Views from the States…

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

Connecticut

A trial court has ruled that records concerning the collective bargaining agreement between the University of Connecticut and the American Association of University Professors were exempt from the Freedom of Information Act because they constituted notes of the discussion of collective bargaining agreement and that the public interest in disclosure did not outweigh the purposes of the exemption. James Boster, a retired UCONN professor, requested records indicating that AAUP was responsible for including a provision restricting other avenues for resolving grievances under the contract. UCONN told Boster that the records he requested pertaining to collective bargaining negotiations that were exempt under FOIA. Boster then filed a complaint with the Freedom of Information Commission, which ruled in favor of UCONN. Boster then appealed the FOIC decision to the trial court. The trial court also sided with UCONN. The trial court noted that "the withheld document is a draft of the 1977 UCONN-AAUP Collective Bargaining Agreement. The draft shows how the agreement changed through negotiation. The withheld document also has handwritten notes on it that reflect the negotiations and the strategy thereof. The withheld record contains cross-outs and edits of the agreement evidencing their preliminary nature and the negotiation process itself. It is in the public interest to withhold documents such as these from disclosure because disclosure would inhibit the negotiation process and could undermine fair negotiations going forward." (*James Boster v. Freedom of Information Commission*, No. HHB CV-196052569, Connecticut Superior Court, Judicial District of New Britain, Dec. 13)

Delaware

The supreme court has ruled that President Joe Biden's Senatorial Papers, which he donated to the University of Delaware to make publicly available once they were catalogued and archived, do not qualify as public records because, except for several narrow exceptions, the University's records are not subject to the Delaware Freedom of Information Act. After Biden announced that he had donated his Senatorial Papers to the University of Delaware, both Judicial Watch and the Daily Caller News Foundation submitted FOIA requests to the University of Delaware for access to Biden's papers. The University told both Judicial Watch and the Daily Caller that only university records related to the expenditure of public funds are considered public records and that no public funds were expended on the Biden papers donation. Further, while Judicial Watch had asked for Board of Trustees meeting minutes, the university

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indicated that only the minutes from meetings of the full Board of Trustees were subject to FOIA and that the full Board had not addressed the issue of donation of the Biden papers. Judicial Watch and the Daily Caller filed suit. The trial court sided with the university. On the issue of what constituted records relating to public expenditures of funds, the trial court found that qualifying records "discuss or show how the University itself spends public funds." Since the Biden Papers were unlikely to discuss how the university spent public funds, the court reasoned, they were not public records. The supreme court also sided with the university. The supreme court noted that "a document is a public record under [the FOIA] when the *content* of those documents relates to the expenditure of public funds. Turning first to the plain language of the [the provision narrowing FOIA's application to the University], the word 'relate' means "to give an account of.' Using that definition, the documents must give an account of the University's expenditure of public funds." The supreme court also held that the trial court did not improperly shift the burden of proof to Judicial Watch and the Daily Caller to show that the records were indeed public records. However, the supreme court faulted the trial court for allowing the university to support its position through unsworn affidavits and ordered the university to furnish sworn affidavits instead. (*Judicial Watch, and the Daily Caller News Foundation v. University of Delaware*, No. 32,2021, Delaware Supreme Court, Dec. 6)

New Hampshire

The supreme court has ruled that the trial court properly conducted an *in camera* review of a line-item expenditure for covert communications equipment by the City of Concord in response to a Right to Know Law request by the ACLU of New Hampshire and the *Concord Monitor* for a better explanation of the $5,100 line item. Concord provided a 29-page license and services agreement with redactions. The ACLU of New Hampshire and the *Monitor* then filed suit. Because the Right to Know Law does not contain an extensive law enforcement exemption, New Hampshire courts have adopted the six subsections of the law enforcement exemption in the federal FOIA, known as the Murray exemption, as the basis for analyzing law enforcement exemptions claims. As part of its *Murray* exemption analysis. the trial court decided to review the redacted agreement *in camera*. After conducting the review, the trial court concluded that disclosure of the information redacted would reveal protected investigative techniques. The supreme court agreed that the trial court's use of *in camera* review was appropriate. The supreme court noted that "after the court observed that *ex parte* proceedings should rarely be used, it reasoned that, because it could not reach a decision 'without learning more about the covert communications equipment,' and due to the risks posed by additional public disclosure, an *ex parte in camera* hearing was appropriate. Under these circumstances, we conclude that the trial court's decision to conduct an *ex parte in camera* hearing was a sustainable exercise of discretion." The supreme court then turned to the issue of whether or not the redactions were proper. It affirmed all of the trial court's redactions except for a provision that provided vendor rights if the technology had been publicly disclosed. (*American Civil Liberties Union of New Hampshire and Concord Monitor v. City of Concord*, No. 2020-0035, New Hampshire Supreme Court, Dec. 7)

The Federal Courts…

Judge Timothy Kelly has ruled that the IRS has still not shown that EPIC does not have a right to receive portions of former President Donald Trump's tax returns. After the D.C. Circuit ruled in favor of EPIC on the issue of whether the IRS could reject EPIC's request for access to Trump's tax returns solely

because it did not have Trump's permission to do so, EPIC continued to argue that one of 13 exceptions to non-disclosure under § 6103 – return information necessary to permit inspection of offers-in-compromise, which is "an agreement between the taxpayer and the IRS to settle a federal tax debt for less than the full amount owed," might be applicable. The IRS argued that § 6103 still prohibited it from disclosing the information. Kelly disagreed, noting that "there is no basis in the statute's text or structure to import these requirements into § 6103(k)(1), which, after all, permits disclosure to 'members of the general public.' And the Court notes that neither the regulation that allows members of the public to inspect information relating to an offer-in-compromise nor the form the public must use to request access to those records mentions a consent or qualifying material interest requirement." The IRS argued that § 6103(k)(1) did not provide a disclosure obligation. Again, Kelly disagreed, pointing out that "Section 6103(k)(1) states that return information '*shall be disclosed* to the extent necessary to permit inspection of any accepted offer-in-compromise.' That Congress used the word 'shall' rather than 'may' like in other provisions under § 6103(k) is telling. The Court cannot read this language as anything but a disclosure obligation." The IRS contended that since the agency had established rules providing for non-FOIA inspection, nothing more was required. Kelly, however, noted that "at bottom, the Court can see no reason why § 6103(k)(1), or the non FOIA in-person inspection regime established by the Secretary, operate to extinguish EPIC's right to make an otherwise valid FOIA request for records covered by the exception." The IRS also claimed that EPIC's suit was barred by **res judicata** since EPIC had litigated the issue of access to Trump's tax returns in its case before the D.C. Circuit. Kelly rejected that claim as well, pointing out that "*EPIC I* involved a FOIA request seeking the former President's 'tax returns for tax years 2010 forward, and any other indications of financial relations with the Russian government or Russian business.' This case arises from a different FOIA request, involving a different FOIA provision, seeking return information relating to any accepted offers-in-compromise by the former President and his associated businesses. The IRS, which bears the burden of establishing res judicata, has not shown that the return information EPIC now seeks was at issue in *EPIC I*." (*Electronic Privacy Information Center v. Internal Revenue Service*, Civil Action No. 18-902 (TJK), U.S. District Court for the District of Columbia, Dec. 3)

A federal court in Florida has ruled that the FBI must process Daniel Villanueva's FOIA request at the rate of 5,125 pages a month until it completes processing the remaining 20,500 pages. Villanueva filed suit in August 2019 14 months after his original request. Two months later, the FBI asserted Exemption 7(A) (interference with ongoing investigation or proceeding) based on the lack of finality of one of the defendants in the underlying criminal investigation who had a petition for certiorari pending with the Supreme Court. In November 2019, the FBI identified 21,000 responsive pages and disclosed 500 pages. At that time, the agency indicated it could complete Villanueva's request in ten months. However, when the magistrate judge ruled, the FBI still had done nothing more than release the original 500 pages. Instead, it asked the court to allow it to respond pursuant to its normal 500-page-per-month rate, taking a total of seven years to complete Villanueva's 2018 request. The magistrate judge faulted the FBI's handling of the request. He noted that "the defendants ignore the following facts: the plaintiff's June 2018 FOIA request has been pending for three and a half years and only 500 of 21,000 pages of responsive documents have been produced; the defendants' failure to comply with the FOIA requirements in apprising the Court of the factual bases to withhold 20,500 pages of responsive documents; and the defendants' failure to produce a sufficient *Vaughn* index or declaration during the pendency of the plaintiff's June 2018 FOIA request and in disregard of the defendants' self-proposed December 2020 deadline. The defendants' Motion essentially requests a three-and-a-half-year extension of the Court-

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imposed October 2021 deadlines." The magistrate judge noted that "seven years to complete the processing of plaintiff's June 2018 FOIA request is too long." As a result, he ordered the FBI to process the request at a rate of 5, 125 pages a month, to be completed in four months. However, the magistrate judge declined to sanction the agency's behavior. (*Daniel Villanueva v. United States Department of Justice and the Federal Bureau of Investigation*, Civil Action No. 19-23452-CIV-CANNON/ O'SULLIVAN, U.S. District Court for the Southern District of Florida, Dec. 13)

Judge Timothy Kelly has ruled that the EPA properly responded to investigative journalist Nicholas Surgey's FOIA request for records concerning former EPA administrator Scott Pruitt's family vacation trip to the 2018 Rose Bowl game. The agency's search located 400 pages of responsive records. The agency withheld 99 records in part and 54 records in full, including contact information of individual law enforcement officers, a Joint Special Threat Assessment for the 2018 Rose Bowl game, Protective Service Detail weekly scheduling documents, and Protective Service Detail travel itineraries or vouchers. Surgey contended that the agency had **failed to conduct an adequate search** and failed to justify its exemption claims. The EPA used keywords designed to focus on uncovering records related to Pruitt's trip, including the use of Sooners and Bulldogs, which were the mascot names of the University of Oklahoma and the University of Georgia. Surgey argued that the agency should have searched for records that related to what the Pruitt family did on its vacation. Kelly disagreed, noting that "'in complying with a FOIA request, an agency is not required to search for records which are beyond the scope of the original request.' And the EPA properly construed Surgey's request as limited to records related to the former Administrator's trip and attendance at the Rose Bowl game." Kelly pointed out that "the former Administrator and his family may have taken other tourist trips during their vacation, but [Surgey's] language [in his request] 'is very specific as to time, place, and event for which information is sought.' Indeed, the ask is only for records 'associated with' former Administrator Pruitt's 'travel to and attendance at' the Rose Bowl game. The repeated use of the word 'associated' in the explanatory sentences that follow – instructing the EPA to include records about 'any *associated* meetings or events' and 'any other *associated* costs' – continues to tie the information requested to the former Administrator's trip to Pasadena to attend the Rose Bowl game." Kelly explained that "put simply, Surgey's 'request was not broadly drawn; it made a specific inquiry about specific actions. The agency was bound to read it as drafted, not as either agency officials or [Surgey] might wish it was drafted.'" However, Kelly noted that "the EPA 'has failed to invoke the magic words concerning the adequacy of the search – namely, the assertion that [the EPA] searched *all* locations likely to contain responsive documents.'" He explained that "the Court will therefore reserve judgment on the adequacy of the EPA's search. Assuming the agency can provide a supplemental declaration showing that it searched all locations likely to contain responsive material, the Court will grant it summary judgment on the adequacy of the search." Surgey challenged the agency's broad use of Exemption 6 to withhold details about the Pruitt's family trip beyond their trip to the Rose Bowl game and Disneyland. While Kelly agreed that there was a substantial public interest in disclosure of the information, he found that further disclosure was unwarranted. He pointed out that "the information disclosed includes key locations where the family would be present on each day – in particular, the Rose Bowl or Disneyland – and the hotels at which they were staying. This should give Surgey all he needs to determine 'how agency resources were expended to cover travel expenses for the [Private Security Detail] on Mr. Pruitt's trip to California.' Any added value provided by knowing further details of where the former Administrator's family otherwise 'dined, stayed, or spent time' would be marginal at best." Kelly agreed with the EPA that it could properly withhold information concerning security staffing under **Exemption 7(E) (investigative methods or techniques)** or **Exemption 7(F) (harm to any person)**. However, he indicated that "the record suggests that at times the

EPA may be applying Exemption 7(E) and 7(F) to neither staffing nor logistical coordination information, like where the Protective Service Detail went or stayed during the family's trip. And the Court is inclined to agree with Surgey that such information would not create a reasonable risk of circumvention or endangerment, thereby preventing the application of Exemption 7(E) or 7(F. But on this record, the Court cannot say for sure that the agency is applying Exemption 7(E) or 7(F) to such information." Kelly ordered the EPA to supplement its affidavits to provide a better explanation of its exemption claims. He also agreed with Surgey that the agency's **segregability** obligations might well be affected by its ability to justify its exemption claims. (*Nicholas Surgey v. Environmental Protection Agency*, Civil Action No. 18-654 (TJK), U.S. District Court for the District of Columbia, Dec. 3)

The Seventh Circuit has ruled that the district court did not err in ruling in favor of the Department of State in a FOIA suit brought by Northwestern University Political Science Professor Jaqueline Stevens for records concerning government funds supporting foreign campuses of American universities. In response to her requests, the State Department provided Stevens with about 150 records in full and 380 records in part and withheld 24 records entirely. The Seventh Circuit explained that Stevens and the State Department disagreed about the agency's obligations to use keywords provided by Stevens in searching for responsive records. Because the agency's initial search yielded a large number of potentially responsive records, the agency asked Stevens if she would be willing to provide a set of keywords for search purposes. Stevens provided keywords and the agency conducted its search. However, the agency believed that the keywords provided by Stevens was a mutually agreed narrowing of the scope of the request and conducted the search with the understanding that Stevens could object during that process. Stevens did not object until she filed her summary judgement motion, at which time she argued that the keywords were meant to provide guidance to the agency, not to limit the scope of the request. However, the Seventh Circuit upheld the district court's ruling that Stevens had waived that argument by not asserting it earlier. The Seventh Circuit noted that the district court "remained entitled to take reasonable steps to keep the case moving forward. And given the timeline just described, the court was well within its rights to hold that Professor Stevens's objections came too late." Noting that Stevens still had a remedy, the seventh Circuit pointed out that "nothing we decide today precludes Professor Stevens from filing a *new* FOIA request seeking documents not captured by the keyword list. Agreements constraining the universe of documents to be searched in response to one request do not collaterally estop or otherwise bar requesters from filing future requests outside the scope of the earlier search." Stevens particularly faulted the search at the U.S. Embassy at Doha as being inadequate. But the Seventh Circuit noted that "to be fair to the Department, its records are spread across offices in 200 countries; some discretion is inevitable. In our assessment, the Department's account of its methods provides sufficient detail for us to say that its methods were reasonable." The appeals court disagreed with the district court's decision to strike portions of Stevens' affidavit because it was not based on personal knowledge. Instead, the appeals court observed that "a FOIA claimant is entitled to argue that a search was unreasonable because a likely storehouse was not searched. District courts are free to disagree with that prediction, but they should be cautious about treating Rule 56(c)(4) as a bar to such a prediction when the claimant has relied on accurate, albeit secondhand, information about the responsibilities of specific departments or officials." The appeals court then upheld the district court's acceptance of the State Department's use of **Exemption 1 (national security), Exemption 3 (other statutes)**, and **Exemption 5 (privileges)**. (*Jacqueline Stevens v. United States Department of State*, No. 20-3504, U.S. Court of Appeals for the Seventh Circuit, Dec. 9)

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Judge James Boasberg has ruled that the Bureau of Reclamation properly responded to a FOIA request from AquAlliance for summaries of water transfers that took place in 2020 under the agency and San Luis & Delta-Mendota Water Authority's Long-Term Water Transfer program. The agency referred the request to the Division of Resources Management in Region 10, the only office the agency deemed likely to have such records. However, a search yielded no records. The agency explained that such summaries were not required to be filed and that to the extent that the agency had collected summaries, they would not be available until the following year. With this knowledge in hand, AquAlliance acknowledged that summaries did not exist but argued that the agency should have looked for underlying materials as well. Boasberg sided with the agency. He noted that "this is not a situation in which the Government is playing it cute – that is knowing what a requester really wants but acting with willful blindness in following the literal terms of a request. On the contrary, Plaintiff itself points out in briefing that it 'asked for a summary because it did not need every single document which contained the basic information sought.' In other words, AquAlliance really did want summaries." AquAlliance argued that the agency had limited its search to records that had "summary" in their titles. But Boasberg indicated that "but the Bureau explains that it did *not* 'merely limit its search to "documents that included the word 'summary' in their titles." And while documents may exist that contain some of the sought information, Plaintiff does not describe what those could be and concedes that they are not summaries." Boasberg observed that "finally, to the extent that AquAlliance would like the Bureau to *create* a summary using the information in its possession, it is well-established that the Government was under no obligation to do so." (*AquAlliance v. United States Bureau of Reclamation*, Civil Action No. 21-632 (JEB), U.S. District Court for the District of Columbia, Dec. 8)

A federal court in New York has ruled that the FBI properly responded to a FOIA request from Leslie James Pickering, co-owner of the Burning Books bookstore in Buffalo, for records concerning the conviction of Leonard Peltier, who was convicted of the 1975 murder of two FBI agents on the Pine Ridge Reservation in South Dakota. Pickering's request was in part prompted by the 2002 revelation that the FBI was destroying certain records pertaining to Peltier. Pickering's attorney, Michael Kuzma, requested that the National Archives and Records Administration take possession of the FBI's Peltier records and NARA subsequently instructed the FBI to provide Peltier's records for permanent preservation. In response to Pickering's FOIA request, the FBI located 6,020 records. After narrowing his request, the parties settled on a review of 5,253 pages of responsive records. The parties agreed that the FBI could randomly select 500 processed pages and provide its justifications for exemption claims. Of those 500 pages, 342 pages were released in part and 158 pages were withheld in full. Magistrate Judge Leslie Foschio found that the FBI's **search** was adequate. Indicating that the FBI's affidavit was comprehensive and thorough, she noted that "significantly, the FBI is not required to search all records systems proposed by a requesting party, including those specified by Plaintiff in his FOIA Request." She added that "nor has Plaintiff provided any information upon which [the FBI's FOIA unit] could reasonably conclude records, including records pertaining to Peltier or Judge Heaney, would reside outside the [Central Records System] and the information found from the CRS search did not indicate any additional records would be located in the other systems Plaintiff identified." Foschio accepted the agency's claims under **Exemption 5 (privileges)**, noting that Pickering had failed to rebut the agency's allegations that records were protected by the attorney work product privilege. She noted that "Plaintiff, by limiting his responses in opposition to summary judgement to the criteria for the attorney-client privilege, provides no basis for challenging Defendant's explanation for withholding the information pursuant to Exemption 5 as attorney work-product." (*Leslie James Pickering v. U.S. Department of Justice*, Civil Action No. 19-001F, U.S. District Court for the District of Columbia, Dec. 7)

Judge Florence Pan has ruled that requests from the non-profit organization Keeping Government Bolden were too **burdensome** for the FBI to process. KGB explained that it was conducting a pilot study of 12 agencies pertaining to their records management policies, particularly as they related to email. As part of that study, KGB filed seven requests with the FBI. Dissatisfied with the agency's response, KGB filed suit, focusing on three of the requests to the FBI. The three requests asked for: (1) email correspondence between National Archives Appraisal Archivist J.P. Schmidt and any FBI email address since January 2016; (2) email correspondence not stored in the Central Records System sent or received by 18 FBI offices in the ten business days before the date of the search; and (3) emails received by former FBI Director James Comey between January 2017 and May 2017 that contained the word "transitory." The FBI refused to process the first two requests because they were too burdensome. The FBI processed the third request but withheld records under **Exemption 5 (privileges)**. The FBI estimated that KGB's request about emails to the FBI's archivist would involve millions of emails while the FOIA request for emails not in the CRS, would likely yield 35,333 emails and take 17,666 hours to process. In response to the Comey request, the FBI searched his unclassified email account and located 2,086 pages of responsive records and withheld many under Exemption 5. Pan found the FBI had sufficiently articulated its burdensome claims. While KGB argued that FBI employees who communicated with the Archivist could be limited to a select few, Pan noted that "it appears that the alleged 'select few' are not readily identifiable." She added that "because this Court cannot identify 'some reason to believe that the requested documents could be located without an unreasonably burdensome search. . .'" As to the request for emails outside the CRS system, Pan pointed out that "asking for records not stored in a particular database is overbroad where the agency has identified 106,000 potentially responsive records and the only way to confirm whether these records are in the database is to check them one by one." KGB argued that the FBI could have searched its CRS database for the emails. But Pan observed that "KGB's specific request was for records *not* stored in CRS, and the FBI was not at liberty to ignore that request and instead provide emails labeled 'records' in its email systems." She pointed out that "the FBI is unquestionably 'bound to read [a FOIA request] as drafted, not as either agency officials or [the requester] might wish it was drafted.' The FBI appropriately read KGB's request as it was written and responded accordingly." Pan agreed that the FBI had shown that the records withheld in response to Comey request were both pre-decisional and deliberative. She also found that the FBI's descriptions met its burden under the **foreseeable harm test**. She pointed out that "the FBI's justification for its withholding expressly identifies those interests and explains why the agency reasonably foresees that those interests would be harmed by disclosure of the document." (*Keeping the Government Beholden, Inc. v. Department of Justice*, Civil Action No. 17-1569 (FYP), U.S. District Court for the District of Columbia, Dec. 13)

Judge James Boasberg has ruled that the Small Business Administration has finally provided adequate justification for its **Exemption 4 (commercial and confidential)** and **Exemption 6 (invasion of privacy)** claims in a case brought by a media coalition led by the *Washington Post* for records concerning loans given under the payroll protection program. In his prior orders, Boasberg recognized that the agency's exemption claims were likely valid but found that the agency had consistently failed to provide adequate justification for them. This time around, he concluded that the agency had finally provided the needed justification. Boasberg originally faulted the agency's failure to show that the information was kept confidential for purposes of Exemption 4. Boasberg noted that "the Court concluded that SBA has not canvassed the actual lenders, and so it instructed the agency to come back with data that would allow the Court to assess 'whether PPP lenders customarily and actually treat interim loan status as confidential.'" Boasberg explained that "since it was last before the Court, SBA has contacted the top

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300 PPP lenders, seeking their position on whether PPP loan status information is customarily and actually kept confidential' and 'found no lender or trade association for lenders that stated a PPP lender discloses interim financial status of their SBA loans to the public.'" He pointed out that "this evidence, especially when considered alongside SBA's earlier submissions, is more than sufficient to allow the Court to conclude that 'PPP lenders customarily and actually treat interim loan status as confidential.'" Boasberg also agreed that SBA had met its burden to show that disclosure would cause **foreseeable harm**. He observed that the agency had shown that "disclosure of interim loan-status information – which may identify a borrower as delinquent on its loan, even if that status is temporary or ultimately irrelevant – could 'negatively impact the borrower's reputation for creditworthiness, or adversely affect its survivability and growth.'" Turning to the Exemption 6 claim, Boasberg explained that he had told the SBA to consult with the IRS and the SSA to discuss ways in which Employer Identification Numbers, which could be disclosed, could be separated from SSAs, which could not be disclosed. However, because Section 6103 prohibits the disclosure of taxpayer information of the prohibitions of Section 6103, both agencies concluded that they were "prohibited by law from providing SBA with results of a comparison between SBA's PPP data and the data possessed by those agencies, which would be critical step for the segregation of EINs from SSNs according to the strategy proposed by Plaintiffs.'" (*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, Dec. 13)

Judge Randolph Moss has ruled that the FBI has failed to justify many of its withholdings in its response to prisoner Alexander Matthews' FOIA request for records concerning his conviction for bank and wire fraud. Moss also rejected the agency's claim that Matthews had **failed to exhaust his administrative remedies** because he had not paid assessed charges for three releases. Instead, Moss found the record made clear that Matthews had paid the fees, albeit belatedly. As part of his 2011 plea agreement, Matthews waived his rights to file a FOIA request relating to his prosecution. In 2013 Matthews filed a FOIA request for his records. The FBI processed his request, reviewing 671 pages, releasing 35 pages in full, 272 pages in part, while withholding 364 pages in full. Moss found that the FBI had failed to show that some records were protected by **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(D) (confidential sources)**. Moss also rejected the FBI's reliance on Matthews' plea agreement waiver since the D.C. Circuit had disapproved of such waivers in *Price v. Dept of Justice*, 865 F.3d 676 (D.C. Cir. 2017). After Moss rejected the agency's plea agreement waiver argument, the FBI processed 5,427 pages at a rate of 500 pages per month. The agency charged Matthews $45 in fees, which he failed to pay. Although Matthews ultimately paid the fees, he still owed another $45 in fees which he did not pay. Moss found that the FBI still had not justified many of its Exemption 6 and Exemption 7(C) claims. He indicated that "indeed, on the present record, the Court cannot even discern the specific nature of the withheld record." He added that "the Court can only guess as to whether the record contains statements from the U.S. Attorney's Office, from a victim or victims, or both." However, he approved of the agency's Exemption 7(D) claims as well as its segregability claims. Turning to the fee issue, Moss agreed that Matthews had failed to pay one assessed charge of $45. However, because Matthews had paid another $45 charge, Moss ordered the agency to disclose the records withheld because of that initial failure to pay. Moss noted that "just as the filing of a lawsuit does not alleviate a FOIA plaintiff's obligations to pay subsequently imposed FOIA processing fees, such a plaintiff's failure to pay the fees associated with *one* production does not grant the agency license to forego explanation of *all* other productions and withholdings." (*Alexander Otis Matthews v. Federal Bureau of Investigation*, Civil Action No. 15-569 (RDM), U.S. District Court for the District of Columbia, Dec. 9)

A federal court in Idaho has transferred a case filed by the Western Watersheds Project in Idaho against the National Park Service to the District of Utah after finding that existing litigation in Utah brought by WWP makes Utah a better **venue** for the litigation. WWP filed suit in Idaho against NPS for its failure to respond to nine WWP requests concerning the management of livestock grazing and associated infrastructure in four units of the NPS system located in Utah and Colorado. The agency asked the court in Idaho to transfer the case to Utah because it was closely related to a 2019 suit filed by WWP in Utah that was still pending. Arguing against the transfer, WWP argued that its principal place of business was in Idaho and that its choice of venue should be given substantial weight. NPS argued that a plaintiff could reside in more than one location and that because WWP frequently litigated in Utah, that district was appropriate as well. Judge David Nye noted that WWP "ignores that 5 U.S.C. § 552(a)(4)(B) provides venue is appropriate in FOIA cases in 'the district in which the complainant resides *or* has its principal place of business.' While a plaintiff may at times reside, and have its principal place of business, in the same location, equating plaintiff's principal place of business with its place of residence would render portions of the FOIA venue provision redundant and thus contrary to a fundamental rule of statutory interpretation. Thus, the Court finds the FOIA venue provision supplements the federal venue statute." Nye added that "WWP made five of the nine FOIA requests at issue in this suit in order to support WWP's complaints in the Utah litigation. WWP's substantial contacts with the District of Utah, and its willingness to litigate in Utah in a case involving the majority of the FOIA requests at issue in this suit – despite its principal place of business in Idaho – suggests that this case could have initially been filed in Utah." Nye observed that four of the five national parks were located in Utah. He explained that "this, in turn, further undermines the overall utility of venue in Idaho, where none of the National Parks or records are located, and none of the NPS units are headquartered." Arguing in favor of retaining the case in Idaho, WWP pointed out that its attorney in Idaho had filed the suit. Nye indicated that "while WWP may have a significant interest in Idaho, the underlying suit has little, if anything, to do with Idaho." He observed that "simply put, several states, and particularly Utah and Colorado, have a greater interest in this suit than does Idaho." Nye concluded that "in sum, Utah has a much greater connection to this suit than does Idaho and the interests of justice accordingly overcome WWP's original choice of forum in this District." (*Western Watersheds Project v. National Park Service*, Civil Action No. 21-00219-DCN, U.S. District Court for the District of Idaho, Dec. 8)

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