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Washington Focus: According to the Department of Interior's quarterly report, the agency's backlog of FOIA requests increased to 4,265 requests between October 1 and December 31, 2020. This compares with a backlog of 1,364 in 2016. According to Michael Doyle, writing for E&E News, the number of FOIA requests received by Interior increased by nearly 24 percent during the Trump administration to over 7,970. In its 2020 annual report, then Interior Solicitor Daniel Jorjani noted that "the Department's attempts to respond accurately, completely, and in a timely manner to every request have been further hindered by the dramatic increase in litigation, particularly over agency non-response to initial FOIA requests." At the end of FY 2019, Interior had 175 active FOIA cases in litigation, compared with 30 cases at the end of FY 2016.

Second Circuit Finds Courts Can Remedy § 552(a)(2) Violations

The Second Circuit has joined with the Ninth Circuit in finding that the affirmative disclosure provisions in Section (a)(2) of the FOIA can be independently enforced by district courts, parting company with the crabbed interpretation of the D.C. Circuit, which has ruled that judicial relief under Section (a)(2) is limited to parties who have already requested the records under Section (a)(3) without success. While agreeing with the Ninth Circuit's ruling, the Second Circuit has also added some analysis on why jurisdictional changes contained in the 1974 FOIA Amendments provided support for the conclusion that Congress intended to expand the types of relief available to litigants.

The ruling comes in a case brought by the New York Legal Assistance Group, which provides low-income clients with a variety of services, including direct representation in removal defense and asylum proceedings, against the Board of Immigration Appeals, to require BIA to routinely publish unpublished opinions, some of which are frequently cited in litigation. From 2012 to 2016, the most recent years for which numbers are available, BIA issued more than 30,000 decisions per year in individual cases. While the vast majority are not binding beyond the parties involved, the BIA designates about

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30 decisions each year as precedential and binding on future immigration courts. Designated precedential decisions are available online in the Executive Office for Immigration Review's electronic reading room. A handful of other BIA unpublished decisions that are deemed by the agency as frequently requested records are also available on the agency's website. The balance of BIA's unpublished decisions are not publicly available electronically. EOIR discourages but does not prohibit parties from citing unpublished BIA decisions in immigration proceedings, including immigration judges themselves.

NYLAG requested, pursuant to § 552(a)(2), that the BIA make publicly available in electronic form all unpublished BIA decisions since November 1996. NYLAG also requested that the BIA make publicly available all future unpublished decisions. EOIR denied the request as overbroad and told NYLAG that it had begun to review and release to FOIA requesters unpublished BIA decisions from October 2015 through 2017. EOIR offered to provide those unpublished decisions, along with future unpublished decisions if NYLAG would narrow its request to those decisions only. NYLAG declined to narrow the scope of its request and told the agency that it was requesting EOIR make these documents electronically available through its electronic reading room. EOIR denied the request, telling NYLAG that its only remedy for an agency's failure to abide by § 552(a)(2) was to request the records under § 552(a)(3).

Relying on *CREW v. Dept of Justice*, 846 F.3d 1235 (D.C. Cir. 2017), the district court dismissed NYLAG's suit, finding that it did not have jurisdiction to grant the requested relief because it read FOIA's remedial clause as granting relief only to a "complainant." The district court also found that the Administrative Procedure Act did not apply because FOIA itself provided an adequate remedy. NYLAG then appealed to the Second Circuit.

Writing for the Second Circuit, Circuit Court Judge Gerard Lynch noted that the *CREW* decision from the D.C. Circuit favored the government, but that the more recent Ninth Circuit decision in *Animal Legal Defense Fund v. Dept of Agriculture*, 935 F.3d 858 (9th Cir. 2019), favored NYLAG. Lynch pointed out that the *CREW* decision was not written on a blank slate because the panel felt bound by a 1996 decision – *Kennecott Utah Copper Corp. v. Dept of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), which limited its ability to provide injunctive relief under § 552(a)(2). Having found that the *CREW* decision suffered from this precedential baggage, Lynch indicated that the Second Circuit panel found *ALDF* far more persuasive. Noting that because *CREW* and *ALDF* were so divergent "we undertake our own independent analysis of the proper interpretation of FOIA's remedial provision," concluding that "Congress has authorized courts to order agencies to comply with the obligations Congress imposed on them in § 552(a)(2)."

Relying on the D.C. Circuit's decision in *CREW*, BIA contended that the judicial relief provision in FOIA limited the court to "order an agency to produce documents only to the complainant rather than the general public. . .In other words, Congress authorized courts to remedy violations of any provision of FOIA, including that requiring that documents be made available to the general public, only by ordering the production of withheld documents to the complainant." By contrast, NYLAG argued that "the use of the conjunctive 'and' in this provision means that Congress gave the court both the power to 'enjoin the agency from withholding' records *and* the power to 'order the production' of records." NYLAG claimed that "interpreting this provision to mean that Congress *withheld* from courts the authority to enjoin agencies from violating the reading room provision would be directly contrary to the statutory text." The BIA responded by arguing that "the text of FOIA's remedial provision should be read so that the final clause ('improperly withheld from the complainant') modifies the entire provision. . .If a district court concludes that the agency has improperly withheld records, it may order that those records be produced only to *the complainant*, not the general public."

Lynch found serious syntax problems with the BIA's reading of the provision, noting that "however, "a coordinating junction like 'and' is typically used for 'linking independent ideas,' suggesting that Congress meant to authorize courts to exercise two independent powers, only the second of which would be modified by the phrase 'to the complainant.'" He observed that "if Congress intended the interpretation that the BIA proposes, it would be far more natural to draft the provision as: 'to enjoin the agency from withholding agency records *from the complainant*, and to order the production of any agency records improperly *so withheld*. While both parties' readings are *possible*, NYLAG's interpretation seems to us by a good measure the more natural meaning of the language chosen by Congress." BIA also argued that "withheld" in context seemed to relate to "the complainant." But Lynch pointed out that "it is entirely natural to say that an agency 'withholds' documents when it fails to publish them in violation of a direct statutory command that they be published in a manner accessible to the public."

Lynch also found the changes in the remedial provision as part of the 1974 FOIA Amendments highly persuasive in supporting NYLAG's position. He noted that "whether the amendment merely corrects an unintended glitch in the original language or effected a change, there can be little doubt that by relocating the judicial review provision Congress amended FOIA to make clear that judicial review is available when an agency fails to comply with *any* provision of § 552(a)." He pointed out that "giving that amendment 'real and substantial effect' and considering it in light of the remedial provision's text and the structure of FOIA, requires us to conclude that Congress intended to give district courts the authority to order agencies to make documents available for public inspection when they fail to comply with their affirmative obligations in § 552(a)(2)." (*New York Legal Assistance Group v. Board of Immigration Appeals, et al.*, No. 19-3248, U.S. Court of Appeals for the Second Circuit, Feb. 5)

Views from the States

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

Connecticut

The federal Second Circuit has ruled that a 2019 Connecticut law sealing juvenile cases that were transferred to adult court violates the First Amendment rights of the *Hartford Courant* to have access to such proceedings once they had been transferred to adult court. Although access to such proceedings had been public previously, the 2019 legislation emphasized the need for continuity in preserving the confidentiality of juvenile proceedings and records. As a result, the legislature came down on the side of confidentiality, requiring juvenile cases that ended up in adult court to be sealed as if they had remained juvenile proceedings. The *Courant* and a coalition of media groups filed suit. The federal court ruled in favor of the media plaintiffs and the State of Connecticut appealed to the Second Circuit. The Second Circuit upheld the district court's ruling, including its decision to provide injunctive relief. Writing for the Second Circuit, Circuit Court Judge Denny Chin explained that Connecticut does not dispute "the existence of this qualified [First Amendment] right, but instead disputes whether that right extends to criminal trials involving juveniles whose cases are transferred from the family division to the regular criminal docket. They argue that the district court erred in holding that the Courant has a qualified First Amendment right of access to proceedings and records in transferred cases." Finding that juvenile proceedings transferred to adult court had been historically public, Chin noted that "many of the considerations supporting confidentiality are no longer applicable in transferred cases and certainly are not so strong as to disregard the long-standing tradition of opened proceedings on the

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regular criminal docket." Having found that historic public access to criminal dockets underscored the existence of a qualified First Amendment right, the Second Circuit then rejected Connecticut's claim that the law was narrowly tailored to meet public access concerns. Chin pointed out that "the restriction on access is not narrowly tailored because there is a presumption of confidentiality when it could be the other way around: the state could serve its interest by retaining a presumption of openness once a case is transferred to the regular criminal docket, such that the presumption is overcome only if the court makes findings on the record to the effect that the need for confidentiality outweighs the public's interest in open proceedings." Agreeing with the district court's grant of a preliminary injunction, Chin observed that "the Courant has shown that all four requirements for a preliminary injunction have been met, and accordingly the district court did not abuse its discretion in granting one here." (*Hartford Courant Company, LLC v. Patrick L. Carroll*, No. 20-2744-cv, U.S. Court of Appeals for the Second Circuit, Feb. 1)

The Federal Courts…

Judge James Boasberg has ruled that the EPA properly withheld records under **Exemption 4 (commercial and confidential)** concerning exemptions requested by small refineries from producing a certain volume of renewable fuel each year after finding the agency had shown that the records were commercial and that the submitting refineries treated the information as confidential. In response to a request from the Renewable Fuels Association and Growth Energy for records identifying refineries that had requested the exemption, the agency identified 72 decision documents from 2015 to 2017 but withheld the petitioner's name and the location of the facility, arguing those data elements qualified as both commercial and confidential. Boasberg agreed to conduct an *in camera* review. Although the Renewable Fuels Association and Growth Energy argued that the EPA had failed to show that the records were "obtained from a person" as required by Exemption 4, Boasberg gave the agency the benefit of the doubt, noting that "given EPA's consistent and repeated explanations that it withheld the names and locations of refineries because of what it would reveal about those refineries, not in order to protect the names and locations in and of themselves, the Court will not put on blinkers in interpreting the agency's [obtained from a person] analysis." He noted that "disclosing the name and location of the refinery at issue in an EPA decision document would *also* necessarily reveal a separate piece of commercial information – namely, that the refinery has petitioned for an exemption in the first place." Finding the information was commercial, Boasberg noted that "where 'the identities of which companies participated in [a government program]' or have sought to participate in that program 'could have a commercial or financial impact on the companies involved,' the fact of participation itself constitutes commercial information." As to seven decision documents it intended to withhold, Boasberg found the EPA had not sufficiently justified that the records were customarily confidential because the refineries in question had only shown they treated one year's petition as confidential rather than showing a consistent policy of confidentiality. He pointed out that "while a refinery that, for instance, kept its 2015 petition secret while disclosing its 2016 petition '*actually*' treated its 2015 petition as confidential, it is difficult to say that it '*customarily*' treated its seeking of relief so." In *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the Supreme Court rejected the substantial harm test as not being supported by the plain language of Exemption 4 and concluded that records qualified under Exemption 4 if they were commercial and customarily treated as confidential by the submitter, and if the agency had provided an assurance of confidentiality. However, the Supreme Court did not address the issue of whether records could be considered confidential without any assurance of confidentiality on the part of the agency. Since there was no clear assurance of confidentiality by the agency, Boasberg fell back on the D.C. Circuit precedent established in *Critical Mass* considering information confidential if the submitter treated it as such. Here, Boasberg observed that "under that test, the refinery information at issue here qualifies as confidential. Were this Court to hold that the information is *not* confidential because a second necessary condition exists that is not met

here, it would essentially be overruling *Critical Mass* or at least declining to faithfully apply it. Absent a Supreme Court holding squarely abrogating Circuit precedent – which *Food Marketing* clearly is not – this Court has no power to depart from the result mandated by that precedent." (*Renewable Fuels Association and Growth Energy v. United States Environmental Protection Agency*, Civil Action No.18-2031 (JEB), U.S. District Court for the District of Columbia, Feb. 4)

A federal court in New York has ruled that while the Department of Justice has shown that some records related to the monitoring of Volkswagen's compliance with the 2018 plea agreement for falsifying its vehicle mileage provided to the EPA are protected under **Exemption 4 (commercial and confidential)** and **Exemption 5 (privileges)** because its current exemptions claims are too broad, the court will need to conduct an *in camera* review to assess their validity. *New York Times* reporter John Ewing requested records concerning DOJ's supervision of VW's compliance with the plea agreement. Ewing narrowed his request to a single report and associated appendices produced by the independent monitor tasked with overseeing VW's compliance with the plea agreement. DOJ initially withheld the report entirely under Exemption 7(A) (interference with ongoing investigation or proceeding), but by the time Judge Katherine Polk Failla ruled Exemption 7(A) had become inapplicable and the agency relied on Exemption 4 and Exemption 5 for the bulk of its claims. Ewing argued that the agency had failed to show that the records were commercial for purposes of Exemption 4. The agency cited two D.C. Circuit district court decisions – *Public Citizen v. Dept of Health and Human Services*, 975 F. Supp. 2d 81 (D.D.C. 2013) and *100Reporters v. Dept of Justice*, 248 F. Supp. 3d 115 (D.D.C. 2017) – which held that records of compliance monitors could be considered commercial for purposes of Exemption 4 coverage – to support its position that Exemption 4 covered the records. After reviewing those cases, Failla noted that "these courts have determined that information about or related to a compliance program is subject to exemption only when it is intertwined with other information that can fairly be described as commercial." She pointed out that the two decisions instead "suggest the parties must provide more detail to support their assertions. In both cases, the court required the government to provide additional evidence to substantiate vague or insufficient claims that information about a company's compliance program was so intertwined with commercial information that it merited withholding under Exemption 4." She indicated that "nor have Defendant and Intervenor sufficiently pointed to other commercial information that warrants large-scale withholding under Exemption 4." She then found that where DOJ and VW had justified data that was commercial, it fell within the parameters of Exemption 4. She also found that DOJ had not sufficiently justified the claims under the **foreseeable harm** standard. Turning to Exemption 5, Ewing argued that the consultant corollary had not been accepted by the Second Circuit. However, Failla found that the Supreme Court's decision in *Klamath* applied. She noted that "the Monitor did not act beyond the typical role as articulated in *Klamath*. Nor was the Monitor 'communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action.'" Nevertheless, Failla indicated that she would review both the Exemption 4 and Exemption 5 claims *in camera*. (*New York Times Company and John T. Ewing, Jr. v. United States Department of Justice, et al.*, Civil Action No. 19-1424 (KPF), U.S. District Court for the Southern District of New York, Feb. 3)

Judge Rudolph Contreras has ruled that U.S. Immigration and Customs Enforcement has not yet shown that it **conducted an adequate search** for records requested by investigative journalist Angelika Albaladejo for records concerning air transportation of noncitizen detainees with certain medical conditions. Based on her review of the ICE Air Operations Handbook. Albaladejo learned that "medical providers must provide clearance for air travel for detainees with medical conditions. . .[and that] these considerations and clearances must be annotated on a medical summary." Albaladejo submitted a FOIA request asking for the medical forms referenced in the IAO Handbook. ICE asked her to narrow the scope of the request, which she did,

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limiting her search to "the relevant [Office of Enforcement and Removal Operations] field offices and IAO headquarters, and the Arizona Removal Operations Coordination Center, located at the Phoenix-Mesa Gateway Airport." ICE responded by indicating that it found no responsive records. Albaladejo filed an administrative appeal, arguing that the agency should have conducted a more robust search of IAO records. The agency upheld its search and Albaladejo filed suit. Contreras found ICE's search wanting. He noted that the agency's affidavit "states that the supervisory mission support personnel 'searched paper files, his computer files, and Outlook by using the search function with the term 'medical.' The declaration does not state why a search of this individual's files would be 'reasonably calculated to uncover all relevant documents.' It is not clear whether this individual would normally maintain transfer authorizations or medical summaries for detainees being transported by air on his computer or among his files. The agency's declaration regarding the search of IAO records amounts to a three-sentence paragraph and is sparse on details. More information is required for the Court to determine whether the agency adequately searched its records." Further, Contreras noted, ICE failed "to address any of the evidence presented by Plaintiff. The IAO Handbook supports Plaintiff's contention that air transport authorization that include medical summaries are sent to IAO prior to transporting detainees." He pointed out that "all this strongly suggests that IAO receives medical summaries via email prior to transporting detainees. In its declaration and briefing, ICE makes no effort to confront this evidence or to explain why the 'ICE Air Mailboxes' or other offices within IAO (including IAO Mesa) would not reasonably contain responsive records. There may be good reasons these other locations were not searched, but if there are, ICE does not provide them." ICE argued that Albaladejo's claims were mere speculation. Contreras, however, noted "Plaintiff brings more than mere speculation; the evidence in the record 'reveals positive indications of overlooked materials.'" Ordering the agency to conduct a further search, Contreras pointed out that "because there is such a disconnect between ICE's explanation of its search and the evidence provided by Plaintiff, on renewed motion for summary judgment, ICE must provide a much clearer explanation of what documents are created as part of the air transportation authorization process at issue. . ." (*Angelika Albaladejo v. Immigration and Customs Enforcement*, Civil Action No. 19-3806 (RC), U.S. District Court for the District of Columbia, Feb. 2)

A federal court in Washington has ruled that NOAA properly responded to two FOIA requests from Sea Shepherd Legal, an organization advocating for the rights of marine wildlife by strengthening existing laws protecting it, by withholding records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. SSL submitted two requests – one to the National Oceanic and Atmospheric Administration and one to the National Marine Fisheries Service – for records concerning the agency's denial of SSL's petition to ban all products originating from New Zealand fisheries because their nets posed a substantial danger to the Maui dolphin. The agencies disclosed more than 1,000 pages entirely but also partially redacted over 400 pages of records. SSL argued that while the records redacted under Exemption 5 were deliberative, they were not pre-decisional because they post-dated the agencies final decisions. The court found that SSL had failed to substantiate its claim for most records except for those that clearly post-dated the publication of the Federal Register notice rejecting SSL's petition. The court noted that "the emails concern internal discussion over 'how to present certain issues,' such as what citations to include in the notice and how to speed publication along. Plainly, the decision to reject the petition had already been made, and these documents concern how to package or present that decision without implicating new policy decisions." For the most part, however, the court agreed with the agencies' characterization of the records as deliberative. As to one set of records, the court pointed out that "these notes reflect the opinion of individual staffers rather than the position of the entire agency, which falls squarely within the understanding of 'deliberative.' Moreover, while the notes. . . undoubtedly capture some factual information, they also reveal what information that staffer found important or relevant. . ." Under Exemption 6, the agencies withheld personally identifying information of New Zealand officials, which would be protected under New Zealand's privacy laws. The court indicated that "the 'marginal additional usefulness' of the New Zealand officials' identities would not add significantly to the

public's understanding of the Government's handling of the petition or the comparability finding." The court also found that the agencies had justified all their exemption claims under the **foreseeable harm** standard. (*Sea Shepherd Legal v. National Oceanic and Atmospheric Administration, et al.*, Civil Action No. 19-0463-JLR, U.S. District Court for the Western District of Washington, Feb. 2)

The D.C. Circuit has ruled that tweets from former President Donald Trump in which he announced that he had stopped payments to Syrian rebels did not constitute an **official acknowledgement** of the existence of payments made by the CIA, reversing the ruling of a district court judge that Trump's tweets prevented the agency from sustaining its *Glomar* response neither confirming nor denying the existence of records in response to requests from BuzzFeed reporter Jason Leopold. Leopold initially challenged the court's **jurisdiction** to hear the case, arguing the district court had not required the agency to actually disclose any documents. Writing for the D.C. Circuit, Senior Circuit Court Judge A. Raymond Randolph indicated that "this misses the point. What matters for jurisdictional purposes under 28 U.S.C. § 1292(a)(1) is whether the district court has issued an injunction, not whether the injunction requires documents to be disclosed." He added that "the appeal from [a *Glomar* response] is by no means 'premature.' If the order goes into effect and forces the agency to reveal whether it possesses the records, any later agency appeal would be fruitless. That cat would be out of the bag, regardless of whether any relevant documents the agency might possess would be exempt from disclosure." Randolph wondered "did President Trump's tweet officially acknowledge the existence of such a program? Perhaps. Or perhaps not. And therein lies a problem." He indicated that "assuming *arguendo* that the President ended *a* program, it is unclear *whose* program the President ended." He noted that "the tweet sheds little, if any, light." Ruling that Leopold had failed to show Trump's tweet constituted an official acknowledgement of the payments, Randolph pointed out that "even if the President's tweet revealed *some* program, it did not reveal the existence of Agency records about that alleged program. BuzzFeed has failed to point to specific information that matches the information sought – the existence of Agency records and, therefore, its intelligence interest and capabilities." (*Jason Leopold and BuzzFeed, Inc. v. Central Intelligence Agency*, No. 20-5002, U.S. Court of Appeals for the District of Columbia Circuit, Feb. 9)

A federal court in Texas has ruled that Diocesan Migrant & Refugee Services is entitled to **attorney's fees** for its FOIA litigation against U.S. Immigration and Customs Enforcement for records concerning why ICE field offices in Southern Texas prevented DMRS from handing out information to migrants about their asylum rights after the Migrant Protection Protocols, which required asylum seekers to stay in Mexico while they waited for U.S. immigration judges to hear their asylum cases, were implemented. Although ICE was apparently unaware of the request until DMRS filed suit, ICE identified 92 pages of potentially responsive documents. The agency provided 10 pages in full, 28 pages with redactions. Another 14 pages were deemed duplicates while 40 pages were referred to other agencies or components. An administrative error delayed the referral process. ICE asked for five more extensions but ultimately disclosed 33 of the 40 referred pages. After holding a trial, the court concluded that ICE had not conducted an adequate search and it had not justified its Exemption 5 (privileges) claims. The court ordered ICE to conduct a new search, which yielded 86,000 potentially responsive records. ICE agreed to assign 30 percent of its FOIA staff to conduct the first line review full-time. ICE also assigned 15 attorneys for a second line review. ICE estimated the review would require four months. ICE did not appeal the order. Finding that DMRS had substantially prevailed for purposes of eligibility for an attorney's fees award, the court turned to a discussion of the four factors used in assessing a fee award – the public interest in disclosure, the commercial or personal interest in disclosure, and the reasonableness of the agency's withholding. The court found the public interest in disclosure was high, noting that "as this information is both of public concern and useful to political decision making, the diffusion of documents will spread beyond legal service providers to the wider public." The court indicated that DRMS

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had no commercial or personal interest in the disclosure of the records. Turning to the reasonableness of the agency's processing of the request, the court found that both the agency's search and its exemption claims were insufficient. The court noted that "there is no reasonable basis in law to believe ICE's search was reasonably calculated to uncover all responsive documents." The court added that "the returned search forms indicate different search terms were used across program offices without any apparent reason for the lack of uniformity." The court found ICE fared no better on the issue of exemptions. The court pointed out that "ICE did less than the bare minimum to justify its exemptions and instead attempted to shift the burden to the court and to DMRS. This forced DMRS to expend considerably more in attorney labor and fees to litigate exemptions to documents produced at the eleventh hour and without the easy remedy of a *Vaughn* index." The court granted DMRS $51,937.50 in fees. (*Diocesan Migrant & Refugee Services, Inc. v. United States Immigration and Customs Enforcement*, Civil Action No. 19-00236-FM, U.S. District Court of the Western District of Texas, Jan. 28)

Judge Royce Lamberth has ruled that the Centers for Medicare and Medicaid Services properly withheld the domain portion of email addresses associated with each national provider identification number from Frederick Trotter under **Exemption 6 (invasion of privacy)**. When registering, healthcare providers must provide contact information – including an email address – for someone who can answer questions about the providers' application. The email address need not be for the provider himself, but each email address must belong to a person, as opposed to an entity or corporation. CMS told Trotter that it had identified 6,380,915 active providers and would withhold all the email addresses because disclosure would constitute an invasion of personal privacy. Although Trotter amended his request for only the domain portion, the agency told him it would still withhold that portion as well. Assessing the privacy interests, Lamberth pointed out that "the information requested – the email address domain names – does indeed convey information about a particular individual. That is so because the email address domains all belong to a person. And those domains convey information about the person to which they belong because the domains identify entities with whom the contact persons have a commercial relationship or, in some cases, the providers' own websites." By analogy, Trotter argued that disclosure of the domain names was no more invasive than the disclosure of only the state portion of a street address. But Lamberth observed that "this analogy is flawed. The privacy exemption would apply to someone's state of residence just as it applies to the email address domain. Though many people share the same state of residence of the same email address domain, both types of information nevertheless convey something particular about an individual." Trotter argued the information was publicly available. Responding to Trotter's claim, Lamberth noted that "CMS does provide email addresses in the same location as identification numbers, but only for participants in electronic health information exchange, a digital records-sharing program. Providers who participate in health-information exchange no longer have an interest in maintaining the privacy of their domains because CMS has disclosed this information publicly. But providers who do *not* participate in health-information exchange still maintain their interest in the privacy of their domains." Lamberth then rejected Trotter's claim that disclosure was in the public interest, pointing out that "Trotter provides no specific reasons to believe that the data would be useful in detecting waste, fraud, or abuse." (*Frederick C. Trotter v. Center for Medicare and Medicaid Services*, Civil Action No. 19-2008-RCL, U.S. District Court for the District of Columbia, Feb. 8)

A federal court in Texas has ruled that the FBI failed to show **exceptional circumstances** existed because of the pandemic and has ordered the agency to begin to process Brian Huddleston's request which encompassed a potential 20,000 pages of responsive records. The court showed sympathy for the plight of the FBI, noting that "if the COVID-19 crisis is not an 'exceptional circumstance' under §552(a)(6)(C)(i), the court is unsure when the exception would ever apply." But the court then pointed out that "even in these extraordinary times, the degree of malleability Defendants propose for the proceedings is unreasonable. . . The

shapeless nature of the relief Defendants seek is anything but transparent." Explaining the agency's proposed schedule further, the court indicated that "the proposed processing rate is impermissible. Given the information currently before the Court, processing 250 pages per month during this reduced-staffing period and 500 pages per month when staffing returns to normal would be an unreasonable delay." The court observed that "the vague and dragged-out timeline Defendants suggest cannot be sustained without a greater showing of exceptional circumstances because 'stale information' produced pursuant to FOIA requests 'is of little value.' Granting the relief Defendants seek would thwart FOIA's 'basic purpose' of 'opening agency action to the light of public scrutiny.'" (*Brian Huddleston v. Federal Bureau of Investigation, et al.*, Civil Action No. 20-477, U.S. District Court for the Eastern District of Texas, Feb. 1)

A federal court in Massachusetts has ruled that Daniel Dem, a naturalized U.S. citizen who had been born in Cambodia, may not have access to the marriage certificate from his former marriage to Narong Iv because even though the marriage certificate is contained in Dem's Alien File it is protected by **Exemption 6 (invasion of privacy)** and may not be disclosed without Iv's authorization. Dem became a naturalized citizen in 1994. When visiting Cambodia in 2006 or 2007, he met and married Iv. When he returned to the U.S., Dem applied for a Petition for Alien Relative to establish his relationship with Iv. He also applied for a Permanent Resident Card and a visa. The U.S. Immigration and Citizenship Service ultimately denied the visa and Dem and Iv fell out of touch. Dem subsequently had a ceremonial marriage in Cambodia to another woman with whom he had a child. His counsel, Thomas Stylianos, informed Dem that his marriage would not be valid in Massachusetts until he obtained a divorce from Iv. To help accomplish that goal, Dem submitted a FOIA request to USCIS for Form I-130, which contained his marriage certificate as an attachment. While Dem may have had access to original documents submitted by himself related to his citizenship under the Privacy Act, since the marriage certificate had been moved to Iv's Alien File in 2009. USCIS interpreted Dem's request as a FOIA request and denied his request under Exemption 6 unless he provided Iv's authorization or proof of death. The court found that Dem had chosen to proceed under FOIA rather than the Privacy Act. Dem argued that the marriage certificate was a public record. However, the court noted that "the issue presented here, however, is a different one, namely, whether the federal government is maintaining this information as a 'record on an individual which can be identified as applying to that individual.' Whether USCIS held these records under Mr. Dem's name or Ms. Iv's name, a FOIA request for these records falls within this category." Balancing the interests in disclosure against Iv's privacy interests, the court noted that "even if Ms. Iv's marriage certificate may be obtained by petitioning the Cambodian government, it does not necessarily follow that Ms. Iv no longer has any expectation of privacy to the open dissemination of the document (even though it may, arguably, lessen her reasonable expectation of privacy)." The court added that "while Ms. Iv's expectation of privacy in the requested documents may be small, and Mr. Dem's need for the documents may be great, FOIA is not the correct mechanism for obtaining the documents." (*Thomas Stylianos, Jr. and Daniel Dem v. United States Citizenship and Immigration Services*, Civil Action No. 20-11127-IT, U.S. District Court for the District of Massachusetts, Jan. 28)

A federal court in Ohio has ruled that the EPA properly withheld records under **Exemption 5 (privileges)** concerning the clean-up of CECOS International, a site located in Clermont County, Ohio, in response to a request from Clermont County. In response to the request, the EPA located approximately 2,000 responsive pages. The agency withheld sixty documents under Exemption 5, citing the deliberative process privilege. Clermont County filed an administrative appeal and the agency provided some documents but continued to withhold 40 documents in full and six in part. Clermont County told the EPA that it would withdraw its challenges to some documents, which left 22 documents withheld in full and 11 in part. The vast majority of the withheld documents were contained in two PowerPoint presentations. Addressing the PowerPoint

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presentations, the court noted that "here, much of the material on the PowerPoint slides, which themselves were marked "Draft for Discussion Purposes Only,' strike the Court as information that may well have been changed or updated based on internal agency discussions. Thus, releasing the draft document, at least to the extent that it might reflect differences from the same document's final form, potentially would create confusion over the Agency's actual position on various issues." The court pointed out that "moreover, although this document is admittedly long (582 slides), the Court finds that one or more of the issues raised above arise on all or virtually all of those slides. That is, the Court finds that there is no meaningful subset of pages that EPA could produce from the overall document. Nor would redactions be effective." The court also approved of a handful of redactions under the attorney-client privilege. The court observed that "to be sure, one of the documents as to which the privilege is invoked is an email between two non-lawyer EPA employees (cc'd to an attorney), but the contents of that communication include a portion that conveys legal advice that one of the two employees had received from the copied EPA attorney." (*Board of Commissioners of Clermont County, Ohio v. United States Environmental Protection Agency*, Civil Action No. 17-389, U.S. District Court for the Southern District of Ohio, Feb. 4)

Judge Colleen Kollar-Kotelly has ruled that the FBI properly withheld records from Anthony Accurso pertaining to his conviction on child pornography charges under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and **Exemption 7(E) (investigative methods or techniques)**. Accurso was convicted in 2014 in the Western District of Missouri. In 2019 he requested records related to his conviction under FOIA. The FBI searched its Kansas City Field Office and located 150 pages of responsive documents. Of those, the agency released one page in full, 53 pages in part, and withheld 96 pages in full. Although Accurso had not challenged the adequacy of the agency's search, Kollar-Kotelly found the search adequate. Accurso argued that the identities of third-party victims were likely in the public record and that the FBI had used Exemption 7(E) too broadly. But Kollar-Kotelly pointed out that the withheld records make "no mention of filenames, and nothing in the records of this case establishes that filenames and victims' names are the same. Crime victims certainly have a cognizable privacy interest that the FBI rightfully acknowledges." Accurso challenged the agency's use of Exemption 7(E) to withhold Computer Analysis Response Team reports pertaining to the agency's analysis of digital media, arguing that use of the database was public knowledge. Kollar-Kotelly disagreed, noting that "that forensic examination involves the retrieval of files and the use of software for this purpose may be public knowledge. What the FBI withholds, however, is information *not* known to the public. Plaintiff can only speculate about that the software, techniques, and procedures CART employed during its examination is known to the public, and his mere speculation as to the content of these records cannot overcome the presumption of good faith accorded to the FBI's declaration or defendant's showing on summary judgment." (*Anthony Accurso v. Federal Bureau of Investigation*, Civil Action No. 19-2540 (CKK), U.S. District Court for the District of Columbia, Feb. 5)

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