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Washington Focus: The law firm of Proskauer Rose LLP released an analysis of the effect of the Corporate Transparency Act, which amends the Bank Secrecy Act and became effective January 1, 2021. Since the Bank Secrecy Act qualifies as an Exemption 3 statue under FOIA, the guidance explores those effects as well. The guidance noted that "BSA states that reports filed under the BSA and records of such reports are exempt from disclosure under FOIA. . .The BSA need not specifically refer to paragraph (b)(3) of FOIA because it was enacted before the date of enactment of the OPEN FOIA Act of 2009. Accordingly, beneficial ownership information provided under the CTA, and thus, under the BSA, is exempt from disclosure pursuant to paragraph (b)(3) of FOIA."

Court Finds Talking Points Not Privileged When Shared with Agency Officials

Ruling in a suit brought by the Ecological Rights Foundation against the EPA, Judge Beryl Howell has indicated that are still some unsettled issues concerning the disclosure of draft statements designed to be used by agency officials to explain a policy to the press or Congress particularly when the prepared statements, for all practical purposes, constitute the final policy of the agency. District court judges in the D.C. Circuit have recently coalesced around finding that such draft statements can qualify for protection under the deliberative process privilege as long as they are both predecisional and deliberative. However, district courts in the Second Circuit have indicated that to the extent that such statements do little more than articulate already-decided policies, they are not deliberative, and, thus, not privileged.

ERF requested records concerning former administrator Scott Pruitt and subsequent administrator Andrew Wheeler, particularly concerning the way the agency processed FOIA requests. After conducting a search, the agency made 13 separate productions of records, withholding records under Exemption 5 (privileges), Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), and Exemption 7(E) (investigative methods or techniques).

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Instead of directly challenging the adequacy of the agency's search, ERF questioned whether the agency had interpreted its request too narrowly, which, Howell noted, "would necessarily render EPA's search inadequate." The EPA withheld 42 attachments that had been sent to Wheeler as outside the scope of the request because they pre-dated July 5, 2018, the day after Wheeler took over from Pruitt. Howell agreed with the agency that "as EPA correctly points out, by requesting calendar records 'from July 5, 2018 to the present, Part 6 of the FOIA Request 'specifically sought Administrator Wheeler's calendar records *since* July 5, 2018, the day he became Acting EPA Administrator.' The plain language of the FOIA Request thus unambiguously states that responsive calendar records are those dated July 5, 2018 or later. Plaintiff does not propose an alternative interpretation of Part 6 of its Request, arguing instead that it 'did not agree to forgo challenging [the pre-July 5, 2018 calendar records] at any time during the conferral process with EPA and EPA has provided no basis on which it can withhold these records.' This argument misconstrues EPA's obligations under FOIA. Otherwise-responsive calendar entries and associated attachments dated before July 5, 2018 are squarely outside the scope of the FOIA Request and thus EPA is not required either to release them or to explain its failure to do so. Plaintiff's later representations concerning these records do not alter the limits imposed by the plain text of its Request."

Howell found EPA's interpretation of Part 8 of ERF's FOIA request, which requested records related to the preparation of memorandum titled "Awareness Notification Process to Select Freedom of Information Act Releases," did not cover drafts was appropriate because ERF, by including the modifier "to EPA staff" had limited the request. She pointed out that "that phrase may be construed as referring either to final instructions, directives, plans, policies, practices, or memoranda *actually* disseminated to EPA staff, as EPA suggests, or to any such documents that were *intended* eventually to be disseminated to EPA staff. The former construction would exclude drafts, the latter would include them. . . The ordinary use and meaning of the phrase weighs slightly in favor of a reading that encompasses only documents that actually were disseminated to EPA staff." She pointed out that "prior drafts of a disseminated document, by definition, do not serve any. . . functions with respect to the final document and therefore do not explain or comment upon the documents sought in Part 8 of the Request."

On the issue of draft statements, Howell acknowledged that "a set of talking points or similar document, even if focused on an agency's external presentation of a past policy decision, *may* fall within the scope of the deliberative process privilege." But she pointed out that "this general principle notwithstanding, the agency's obligation to show that each of its withholdings of records reflecting deliberations about external communications satisfies the exemption's criteria remains." She indicated that "the categorical approach urged by plaintiff to exclude from the deliberative process privilege agency records of talking points, though attractive in its simplicity of application, is an overreach, and the harder job of reviewing each document in context is required."

Howell indicated that "talking points that are shared with agency decisionmakers for actual use in making a public statement are disqualified from exemption because they have become final rather than deliberative." She explained that "a talking-points document that is attached to a calendar entry for an event at which an official is expected to speak, or for a scheduled meeting or call, therefore presumptively reflects the agency's final decision as to what information to share and how to share it." She acknowledged that some district court judges in the D.C. Circuit had concluded that such talking points remained privileged "because the official may not stick to the script or may closely follow the talking points without formally adopting their reasoning." Howell traced that conclusion to the recent D.C. Circuit decision in *Machado Amadis v. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020), which had cited the 1975 Supreme Court decision in *Renegotiation Board v. Grumann Aircraft Engineering Corp.*, 421 U.S. 168 (1975), as holding that records could remain privileged even if there was no explanation of whether or not they had been adopted. However, Howell found the

circumstances surrounding the final talking points to be substantively different in kind. She noted that "a rule that deems such records as mere recommendations about what a decisionmaker should say undermines FOIA's larger aims by effectively allowing an agency to withhold all records related to its public communications and protecting even final decisions from public view." She pointed out that "that an agency official might extemporize some portion of her remarks while relying on a final set of talking points does not alter the finality of the agency public relations decisions that the talking points reflect. Final talking points taken up to the podium are the agency's determination of what information should be shared and how to share it. . . Regardless of whether or how they are ultimately used, then, final talking points and similar documents memorialize the agency's final decision about its public relations strategy with regard to a particular event or topic and are therefore neither predecisional nor deliberative." (*Ecological Rights Foundation v. U.S. Environmental Protection Agency*, Civil Action No. 19-980 (BAH), U.S. District Court for the District of Columbia, Feb. 13)

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 General Counsel failed to show that the exemption protecting the identities of individuals applying for employment with an agency covered records about the appointment of a commonwealth court judge, which had been requested by reporter Paula Knudsen. OGC also claimed the records were protected by the deliberative process privilege. Knudsen complained to the Office of Open Records which ruled in her favor. OGC then appealed. After reviewing the meaning of the term "appointment,' the appellate court noted that "these applicants never applied for employment with OGC or the Governor." The appeals court added that "the individuals who submitted applications for a gubernatorial appointment are neither agency employees nor are they individuals who were not hired by an agency, and consequently. . .the RTKL does not apply to the applications of individuals seeking a judicial appointment from the Governor to fill a vacancy." The appeals court also found that the appointment records were not deliberative, noting that "the scope of the request does not include any memoranda that contains recommendations of one applicant being more qualified than another. Rather, the request seeks the applications, which contain work experience, education, and other background information about applicants." (*Office of General Counsel v. Brad Bumsted and LNP Media Group, Inc.*, No. 1764 C.D. 2019, Pennsylvania Commonwealth Court, Feb. 23)

Washington

The supreme court has ruled that the Washington State Bar Association is not an agency subject to the Open Public Meetings Act and that a trial court erred in finding that bar member Lincoln Beauregard had standing to challenge the recent termination of executive director Paula Littlewood by claiming her termination took place in an executive session in violation of the OPMA. While the trial court ruled that WSBA was subject to the OPMA, it did not void Littlewood's termination as requested by Beauregard but instead told the WSBA to comply with the OPMA going forward. The supreme court disagreed, pointing out that "the state bar act [of 1933] made WSBA membership mandatory for the practice of law. . .But the state bar act did not create the WSBA." The supreme court noted that "because the WSBA existed as a voluntary association prior to the 1993 statute, it was not created 'pursuant to statute.' Thus, it is not a 'public agency'

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under the OPMA." (*Lincoln C. Beauregard v. Washington State Bar Association*, No. 97249-4, Washington Supreme Court, Feb. 11)

The Federal Courts…

Judge James Boasberg has ruled that the Export-Import Bank has justified most of its **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)** claims in response to two FOIA requests from Cause of Action Institute concerning communications involving four senior officials regarding a series of individuals and business entities, but because its *Vaughn* index is often sloppy, he gave the agency multiple opportunities to better explain its withholding claims. The agency ultimately disclosed 7,633 pages but withheld records under Exemption 5 and Exemption 6. Boasberg conducted an *in camera* review. He found that EXIM had shown that portions of portfolio risk-management reports were both prdecisional and deliberative. He noted that "the factual material contained in the responsive reports reflects their drafters' discretionary judgment regarding the particular information that would be relevant to [the agency's] decisionmaking process." But he pointed out that the agency had failed to provide an adequate explanation for withholding 24 pages of cybersecurity-related memoranda, primarily because they were not even listed in the agency's *Vaughn* index. He observed that "it need scarcely be said that the Court cannot affirm Defendant's withholding of records it never even acknowledges. Indeed, it is painful enough for the Court to laboriously pore over all of these *in camera* records even without errors." Nevertheless, Boasberg explained the documents appeared to likely contain exempt material and he give EXIM a chance to provide further explanation for withholding them. He found the agency had similarly failed to provide justification for senior staff reports, noting that "defendant simply approaches the document from a generic, 30,000-foot view while ever so briefly narrowing in on a few unrepresentative portions, some of which do clear the Exemption 5 bar. That will not do, particularly given the wide variety of content contained in the lengthy reports. . . It is not this Court's place, moreover, to hypothesize forms of upper-level decisionmaking that the reports are intended to serve, especially when EXIM does not itself identify any." Boasberg faulted EXIM for treating documents created by GAO as part of an audit as privileged. He noted that "notwithstanding the fact that the documents were created by Congress, then, Defendant seems to contend that they were nonetheless 'part and parcel of the agency's deliberative process' because the audit to which they contributed was in turn a component of a broader agency review of its anti-fraud controls. The Court has its doubts as to the viability of this tack. In light of its disposition on other issues, however, it will provide the Bank another opportunity to more precisely explain how the GAO audit served its own decisionmaking process, as well as how the documents qualify as both predecisional and deliberative in any event." (*Cause of Action Institute v. Export-Import Bank of the United States*, Civil Action No. 19-1915 (JEB), U.S. District Court for the District of Columbia, Feb. 23)

Judge Christopher Cooper has ruled that the intelligence community agencies have now shown that they properly responded to journalist Barton Gellman's request for records about himself and withheld records under **Exemption 5 (privileges)**. In a previous opinion in March 2020, Cooper told the agencies to explain a number of redactions. Cooper found that redactions made in an email chain created by the Office of the Director of National Intelligence were protected by the deliberative process privilege. Gellman argued that the agency had failed to show that the contents of the email had not been adopted as the final decision of the agency. But Cooper pointed out that "the Court disagrees. To reiterate, the plaintiff bears the burden to show evidence, beyond a mere 'speculation,' that a document has been adopted and thus lost its predecisional status. Here, Gellman has provided no non-speculative reason to believe the redacted language in ODNI Document 42 was later adopted as agency policy." He noted that "but it does not follow that *all* assertions of the

deliberative process privilege, including those that do not relate to 'draft' documents, must be accompanied by an affirmative statement of non-adoption." The Justice Department's Office of Information Policy withheld records because they were draft statements. Gellman challenged an email sent from a public affairs officer at the National Security Agency concerning an article that had appeared in the *Washington Post*, arguing the email had been adopted as the agency's public statement. But Cooper observed that "it does not appear that [NSA public affairs officer Andrew Ames] was the final decisionmaker on what the NSA would tell the *Post*, and the record does not indicate whether the NSA ultimately adopted the redacted draft statement or otherwise used the statement in its response. The Court cannot say it was unreasonable for OIP to conclude that Mr. Ames's email was a mere predecisional recommendation without obvious markers of adoption." Rejecting Gellman's attempts to undermine OIP's claim that drafts were protected by the deliberative process privilege, Cooper pointed out that "Gellman misconstrues the case law on waiver of the deliberative process privilege. A document that makes recommendations to a senor agency official in anticipation of an engagement with journalists does not lose its privileged status simply because the official uses the documents as intended and follows some of its recommendations. Subjecting all such deliberative documents to disclosure would interfere with the 'ability of government employees to be candid when deliberating how to respond to the press.' Therefore, courts in this district generally allow agencies to withhold their internal deliberations about press statements, unless the agency subsequently made a public statement that 'replicated' the text of the deliberative document." (*Barton Gellman v. Department of Homeland Security, et al.*, Civil Action No. 16-635 (CRC), U.S. District Court for the District of Columbia, Feb. 22)

A federal court in California has ruled that the FBI properly withheld records related to its investigation of Anthonius Wamang, an Indonesian citizen and Papuan separatist fighter, who had been convicted of the 2002 murder of two American citizens in Papua, Indonesia under **Exemption 7(A) (interference with ongoing investigation or proceeding)**. Wamang was convicted of the murders in Indonesia and is serving a prison sentence there. The Center for Investigative Reporting submitted a FOIA request for the records. The FBI told CIR that it had identified 24,000 pages of records, as well as 47 hours of video and audio footage. The agency separated out and released 398 pages and 51 minutes of the recordings that it concluded would not jeopardize U.S. plans to extradite Wamang to the United States after he finished his prison sentence in Indonesia but withheld the remainder under Exemption 7(A). Magistrate Judge Laurel Beeler ruled in favor of the government. She noted that "there is a pending or prospective law-enforcement proceeding. The United States charged Anthonius Wamang with murder and related charges, secured an arrest warrant, and intends to prosecute him after he is released from Indonesian custody. Exemption 7(A) applies to long-term or dormant investigations that could lead to a prospective law-enforcement proceeding. To the extent that the Center contends that the life sentence in Indonesia means that prosecution here is a legal impossibility. It is not. It may be difficult to secure Mr. Wamang's presence here because there is no extradition treaty, but that does not mean that the United States cannot secure his custody." CIR argued that testimony of FBI agents at Wamang's trial in Indonesia were now part of the public record and should be released. Beeler disagreed, pointing out that "public availability of information – like the agents' testimony at a trial – does not trigger the official-acknowledgment doctrine. Instead, the specific information that the Center seeks 'must already be in the public domain by official disclosure.'" She observed that "here, the plaintiff has not pointed to 'specific information in the public domain that duplicates that being withheld.' The plaintiff has not established that the agents' testimony is an official acknowledgement by the FBI: an agent's testimony generally is not within the agent's official capacity or an official acknowledgement of anything. Also, documents leaked by others are not an intentional public disclosure. Similarly, the Indonesian police records – submitted by the Center after briefing – are not an official disclosure by the FBI." (*Center for Investigative Reporting v. Federal Bureau of Investigation*, Civil Action No. 19-04541-LB, U.S. District Court for the Northern District of California, Feb. 18)

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A federal court in West Virginia has ruled that Terry Hughes **failed to exhaust his administrative remedies** in his FOIA suit against the Department of Justice concerning the investigations of Kevin Andrew Broyles and three other individuals by the FBI and DEA. Although the agency denied his request, Hughes did not file an administrative appeal, but instead asserted that he wanted to limit his request to records about Broyles. The FBI closed Hughes' request on Broyles because it did not include a third-party authorization. Hughes filed an administrative appeal to the Office of Information Policy, providing information confirming that Broyles had died. OIP remanded his request back to the FBI, which conducted a search, but found no records. Hughes argued that because he had already filed an administrative appeal with OIP, he had constructively exhausted his administrative remedies. The court noted that "however, constructive exhaustion permits a plaintiff to commence suit when, in certain circumstances, an agency fails to comply with FOIA's time-limit provisions. The plaintiff has not alleged or shown that the FBI failed to comply with FOIA's time limitations; thus, FOIA's provisions relating to constructive exhaustion have no application here. Further, the plaintiff cites no authority suggesting that FOIA's exhaustion requirement may be satisfied when a requester mistakenly believes that he has exhausted his administrative remedies, and the court is aware of none." (*Terry Hughes v. United States Department of Justice*, Civil Action No. 19-00550, U.S. District Court for the Southern District of West Virginia, Feb. 24)

A federal court in Illinois has ruled that prisoner William White has not shown that components of the Department of Justice improperly responded to his FOIA requests. White had asked the court to reconsider its previous ruling. Rejecting that claim, the court observed that "White has not presented clear and convincing evidence that DOJ perpetrated any intentional or unintentional fraud or misrepresentation on the Court with respect to its conclusions about ATF's and BOP's responses to his FOIA requests. He has not pointed to any evidence that any action by the DOJ amounted to fraud and prevented him from fully and fairly presenting his FOIA case and any assertion otherwise rests solely on speculation. In light of the Court's painstaking review of each of White's FOIA claims in this case, including its post-judgment exploration of misrepresentations made in connection with the USMS's FOIA response, the Court believes that White has been able to fairly present his case, that the Court has correctly assessed his merits of his claims, that it has not been a victim of fraud by the DOJ, and that White has not established a legitimate basis for relief from judgment." (*William A. White v. Department of Justice*, Civil Action No. 16-948-JPG, U.S. District Court for the Southern District of Illinois, Feb. 18)

Judge John Bates has ruled that even though the Department of Justice has admitted that it violated the fair-balance provisions of the **Federal Advisory Committee Act**, the effect of those violations on the NAACP Legal and Educational Fund, which brought litigation challenging the fair balance of the Presidential Commission on Law Enforcement and the Administration of Justice should be explored further, including disclosure of more records. Bates pointed out that "although defendants admit they violated Section 5(b)(3), there remains a meaningful, live dispute over the nature of the violation. Defendants concede only that the Commission's founding documents lacked 'provisions' to prevent inappropriate influence – not that the Commission was, in fact, inappropriately influenced. In contrast. LDF alleges that the Commission was inappropriately influenced by Attorney General Barr and special interests and seeks an order detailing 'the nature and scope' of that influence and 'by whom it was exerted.'" Bates agreed with LDF that public comments received by the Commission but not provided to all commission members were subject to disclosure. He pointed out that "the fact that a gatekeeper withheld certain comments from some Commissioners does not immunize those comments from public disclosure. Similarly, defendants must

disclose other materials sent to or from the Commission's official email account that comport with the Court's understanding of Section 10(b) [the records disclosure requirement]." (*NAACP Legal Defense & Educational Fund, Inc. v. Monty Wilkinson*, Civil Action No. 20-1132 (JDB), U.S. District Court for the District of Columbia, Feb. 24)

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