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Washington Focus: An analysis from the FOIA Project has shown that while agency backlogs have continued to increase, the number of pending lawsuits has increased as well. The FOIA Project noted that the number of pending FOIA cases climbed to 1,683 in FY 2020, more than triple the amount in FY 2010, when the pending caseload was 467. The FOIA Project indicated that "the backlog does not seem to be driven by case filings. During the last two years, FOIA filings have not increased while the FOIA lawsuit backlog continued to balloon. The number of new lawsuits peaked in FY 2018 when a total of 871 new FOIA cases were filed. In FY 2019 suits were slightly lower with 854 new filings, and this fell to 808 during FY 2020. However, the backlog of undecided cases continued to grow."

Court Finds Agency Failed to Explain Why FRA-Like Records Were Not Found

Ruling in a suit brought by the Center for Biological Diversity against the Interior Department for records about the Trump administration's decision to lift the moratorium on coal leasing activities related to Secretarial Order 3338, which was published in the Federal Register on March 28, 2017, Judge Beryl Howell has found that the agency failed to show that it had conducted an adequate search for records responsive to several portion of the six-categories identified in CBD's FOIA request. CBD particularly challenged the agency's failure to find responsive records in the Office of the Secretary.

Howell began by outlining the categories of records requested by CBD concerning former Interior Secretary Ryan Zinke. Those included personal devices and communications, government devices and accounts, as well as records held or related to the Trump Transition Team, particularly those pertaining to David Bernhardt, who led the Trump Transition for DOI and later became Secretary himself after Zinke resigned. Howell pointed out that "the significance of the missing drafts and Secretary-level communications cannot be understated in assessing the sufficiency of DOI's declarations describing the search."

Interior argued that under the D.C. Circuit's holding in *Iturralde v. Comptroller of the Currency*, 315 F.3d 311 (D.C. Cir. 2003), the fact that an agency did not uncover any documents in its search was not by itself an indication that the search was inadequate. But Howell pointed out that an exception to *Itutrralde* was when there was reason to believe records should have existed. Here, she explained that "as to the missing drafts of Secretarial Order No. 3348, plaintiff points to the fact that the Order was signed by Secretary Zinke on March 29, 2017, which fact alone gives ample cause to believe that at the time of DOI's initial search later that year, at least one draft should have been among the agency's records. Plaintiff correctly notes that DOI is required, under the Federal Records Act and its implementing regulations" to document its policies. Thus, affording DOI the 'presumption of regularity' to which it claims to be entitled that agency employees comply with applicable law, plaintiff has met its burden to show that drafts or, at a minimum, notes or other documents reflecting the formulation of, Secretarial Order No. 3348 must have existed at the time of the search."

She observed that "even without the backdrop of the FRA, plaintiff's belief that drafts of the Order may exist carries more than just speculative weight. To accept the premise that no such documents exist would lead to the conclusion that Secretarial Order No. 3348, a Cabinet-level directive directly responsive to Executive Order 13783, signed by Secretary Zinke the day after Executive Order 13783 was issued, was somehow developed in the intervening twenty-four-hour period without any prior planning, revisions, review, or discussions within DOI or between DOI and the White House. That conclusion defies credulity."

Howell found it equally incredible to believe DOI's alternative theory that "Secretary Zinke himself neither reviewed even one draft of, nor engaged in any substantive communications about, the order he was poised to sign." Howell pointed out that the agency's alternative theory posited that "Secretary Zinke adopted an order overturning current agency practice and precedent without engaging in any substantive discussions or communications about either the decision to implement the order or the language to be used. The agency's alternative theory is indeed highly implausible and, if true, deeply troubling."

She pointed out that under *Aguiar v. DEA*, 865 F.3d 730 (D.C. Cir. 2017), an agency affidavit that only identified the components searched without explaining how the search was conducted was inadequate. She indicated that "applying those criteria here, DOI's primary declaration in support of its search fails to pass muster." She noted that "as to search terms, DOI states that custodians were instructed to 'base their search on the subject matter of Secretarial Order No. 3338,' but this vague statement does not provide sufficient information as to the exact search terms used by custodians in carrying out the search, an omission that is of particular concern with respect to custodians' search of electronic records. Nor does the declaration provide a clear idea of how custodians went about retrieving and searching their electronic files."

Howell also pointed out the relevance of the recent D.C. Circuit decision in *In re Clinton*, 973 F.3d 106 (D.C. Cir. 2020), where the D.C. Circuit ruled that a district court judge could not require an agency to conduct an Federal Records Act-like inquiry to uncover purely hypothetical records. She observed that "when considering a challenge under the FRA, the reviewing court may reach the broader question of 'whether there might exist any other documents' sought by plaintiff, even if the plaintiff can point to nothing more than speculation of its claim that that the agency has withheld such documents. In contrast, this inquiry is foreclosed by FOIA unless a plaintiff proffers more than speculation in support of its claim that documents exist, and even then, review centers on the adequacy of the agency's efforts to locate the missing records rather than the success of those efforts." She noted that "plaintiff's assertion that these two sets of records must exist and are conspicuously absent from DOI's productions is. . .a common-sense assumption based on the premise that the agency complies with federal law when developing and adopting policies, not speculation." She added that "even if plaintiff's claims were speculative, DOI's descriptions of its searches are facially inadequate, requiring remand to the agency independent of any further doubts cast on its declarations by plaintiff."

DOI claimed it was stymied in searching Zinke's personal devices because he no longer worked for the government. While Howell noted that Zinke's government-issued phone had been searched, she agreed with CBD that "plaintiff's contention that responsive records may be located on former Secretary Zinke's personal devices or accounts is more than mere speculation, but entirely common sense. If, as DOI claims, the agency has truly exhausted its search of its own records, former Secretary Zinke's personal devices and accounts are the next logical place to search for drafts that the Secretary should have reviewed and his related communications." She indicated that the agency must contact Zinke and ask him to search for any agency records he might have on his personal devices and to then make them available to the agency.

Howell found that records of the transition team were no subject to FOIA. She pointed out that "to the extent that plaintiff requests that DOI be required to search files held by the Transition Team or Bernhardt, third parties to the litigation who are not agencies or agency employees, FOIA does not provide for such a remedy." However, she indicated that "the agency must either clarify in its declarations the extent to which its searches to date encompassed and identified records consisting of correspondence between DOI employees and the Trump Transition Team or expand its search to include these records." (*Center of Biological Diversity v. Bureau of Land Management, et al.*, Civil Action No. 17-1208 (BAH), U.S. District Court for the District of Columbia, March 9)

Views from the States

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

Maryland

A court of appeals has ruled that portion of records concerning an application to the Impact Center at the New York University School of Law by the Office of the Attorney General are protected by the attorney-client privilege and were properly redacted in response to a request from Government Accountability & Oversight. The Impact Center works to support state attorney generals by providing legal assistance on certain matters or by providing funding to hire an NYU fellow to serve as a special assistant attorney in the office of the state attorney general. OAG applied for a fellow and the Impact Center approved its application. GAO submitted a request under the Public Information Act for records concerning the application. OAG disclosed the application with redactions under the attorney-client privilege. GAO filed suit and the trial court ruled in favor of the OAG. GAO then filed an appeal. GAO argued that the application was submitted before any attorney-client privilege existed and that it focused instead on funding and public relations. However, the court disagreed, noting that "the redacted portions of the application are privileged as preliminary communications made between a client and his prospective counsel while seeking legal assistance." GAO also argued that the privilege did not attach until the OAG and the Impact Center signed a retainer agreement. But the appeals court pointed out that "the application was a preliminary communication between the OAG and the prospective counsel, the Impact Center." The appeals court observed that "the application included an explanation of the reasons that the OAG was seeking legal counsel, as well as the potential initiatives that the OAG would pursue if the Impact Center agreed to provide legal services. The appeals court added that "because the application served as the OAG's initial communication with its prospective counsel, in which the OAG explained its reasons for seeking legal representation and potential litigation strategies, an attorney-client

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relationship existed." (*Government Accountability & Oversight, v. Frosh*, No. 2602, Sept. Term, 2019, Maryland Court of Special Appeals, Mar. 1)

South Carolina

A court of appeals has ruled that there is no private right under the South Carolina Freedom of Information Act to require an agency to recover records that are unintentionally destroyed. While representing a former part-time chief magistrate in Newberry County, attorney Desa Ballard discovered that the county had inadvertently destroyed emails and text messages relevant to the case. Months before Ballard's FOIA request for the email records, the county administrator's computer crashed, and the county had no way to retrieve records that were lost. While the county was still able to retrieve 2,000 post-crash emails, Ballard alleged the county had violated FOIA because it did not retain records required to be created and maintained under the Public Records Act. The trial court ruled that there was no private right of action under the Public Records Act to require public bodies to retain records. The trial court also ruled that the county had violated FOIA by not explaining the purpose of several executive sessions. The appeals court noted that "there is also a virtually unbroken string of precedents refusing to recognize implied rights of action in statutes that – like the Public Records Act – describe the government's basis structure and operation." The appeals court pointed out that "if we were to recognize a general right to seek a declaratory judgment that the Public Records Act has been violated, we would be creating something the General Assembly did not create and might not create if it considered the issue." Rejecting Ballard's FOIA claim, the appeals court indicated that "if a public body violates that requirement to implement a program for archiving and maintaining public records, it violates the Public Records Act – not FOIA. These are separate statutory regimes, and the plain text of FOIA's civil remedy instructs that it is not a tool for enforcing statutes that are not a part of FOIA." (*Desa Ballard v. Newberry County*, No. 2017-002429, South Carolina Court of Appeals, Jan. 13)

Utah

In two companion cases, the Utah Supreme Court has ruled that the County Commissions of Kane County, Garfield County, and San Juan County violated the Utah Open and Public Meetings Act when they failed to publish notice of meetings between the commissions and then Secretary of Interior Ryan Zinke to discuss the impact on the counties of the proposed reduction of the Grand Staircase-Escalante National Monument and the Bear Ears National Monument. Because OPMA's open meeting requirements are only triggered if the public body plans to consider taking public action as a result of its meeting, the commissions argued that the meetings with federal officials were not subject to the open meetings provisions because they did not involve any actions on the part of the county commissioners. The supreme court noted that both cases hinged on whether SUWA had standing to pursue its claim that it had been injured by the commissions' failure to allow them to attend the meetings. Ruling in favor of the SUWA on that issue, the supreme court explained that "the [district] court's conclusion that the meetings with Secretary Zinke were not subject to the Act ultimately depends on an interpretation of the Act's scope and the nature of what was discussed in the meetings. It therefore 'concerns the merits rather than the justiciability' of SUWA's claims. Rather than assess the merits of SUWA's claims, the district court should have determined whether the facts in SUWA's complaint satisfied our 'standing' requirements. By doing otherwise, the court incorrectly conflated those requirements with the validity of SUWA's claims." The supreme court indicated a relaxed standard for bringing OPMA claims in the first place, noting that "it is likely that most cases seeking to enforce the Act will have arisen because the plaintiff was prevented from knowing what took place at a meeting allegedly governed by the Act." The supreme court pointed out that "in the context of the Act, pleadings will provide defendants with adequate notice when they specifically identify the meeting or meetings at issue and contain 'reliable indicia that lead to a strong inference' that 'matters' under the public body's jurisdiction were discussed. SUWA's pleadings satisfy this standard. SUWA has specifically identified meetings in which

alleged violations of the Act occurred and it has alleged factual circumstances leading to a strong inference that statutory violations took place. In short, SUWA's complaint provides the Commissions adequate notice and a fair opportunity to respond to SUWA's claims." (*Southern Utah Wilderness Alliance v. Kane County Commission and Garfield County Commission*, No. 20180454, and *Southern Utah Wilderness Alliance v. San Juan County Commission*, No. 20180410, Utah Supreme Court, Feb. 25)

The Federal Courts…

The U.S. Supreme Court has ruled that although biological opinions prepared by the Fish and Wildlife Service reflected the final opinion of the agency, because they were then considered by the EPA as part of its decisionmaking process they are still protected by the deliberative process privilege. The Sierra Club requested records about the FWS's 2013 consultation with the EPA concerning whether a proposed rule on the design and operations of cooling water intake structures used to draw large volumes of water from various sources to cool industrial equipment would cause harm to aquatic species protected under the Endangered Species Act. As a result of the 2013 consultation, FWS found that the proposed rule would jeopardize endangered species and prepared both draft and final biological opinions. However, they were not sent to the EPA. Instead, the EPA made significant revisions in the proposed rule and in March 2014 the FWS sent the EPA a biological opinion finding the new rule would not jeopardize protected aquatic life. The Sierra Club's FOIA request included the FWS's 2013 draft and final biological opinions. The agency withheld them, claiming they were protected by the deliberative process privilege. Both the district court and the Ninth Circuit agreed with the Sierra Club, finding the 2013 draft and final opinions constituted the final opinion of the FWS and thus could not be considered deliberative. Writing for the 7-2 majority, Associate Justice Amy Coney Barrett reversed. She noted that "the agreement between the Services and the EPA allowed for the possibility of post-circulation changes. . .The logical inference is that the Services expected the EPA to provide comments that they might incorporate into the final opinion." The Sierra Club argued that the existence of the 2013 opinions had a "real operative effect" on the EPA's subsequent actions, meaning the opinion was final under Supreme Court precedent. Noting that the Sierra Club misunderstood the Court's precedent, Barrett explained that "while we have identified a decision's 'real operative effect' as an indication of its finality, that reference is to the legal, not practical, consequences that flow from an agency's actions." Noting that the Sierra Club's effects-based test was incorrect for analyzing such issues, Barrett pointed out that "to determine whether the privilege applies, we must evaluate not whether the drafts provoked a response from the EPA but whether the Services treated them as final." Answering that question, Barrett noted that "they did not." She then pointed out that "further consultation with the Services prompted the EPA to alter key features of its 2013 proposal, so there was never a need for the Services to render a definitive judgement about it." The Sierra Club argued that the Court's holding would allow agencies to protect records by referring to them as drafts. However, Barrett observed that "determining whether an agency's position is final for purposes of the deliberative process privilege is a functional rather than formal inquiry. If the evidence establishes that an agency has hidden a functionally final decision in draft form the deliberative process privilege will not apply." Associate Justice Stephen Breyer, joined by Associate Justice Sonia Sotomayor, dissented. He pointed out that "the likely finality of a Draft Biological Opinions, its similarity to a Final Biological Opinion, the similar purposes it serves, the agency's actual practice, the anomaly that would otherwise exist depending upon the presence or absence of a private party, and the presence of at least some regulation-based legal constraints – convince me that a Draft Biological Opinion would not normally enjoy a deliberative privilege from FOIA disclosure." (*United States Fish and Wildlife Service, et al. v. Sierra Club, Inc.*, No. 19-547, U.S. Supreme Court, March 4)

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The full Ninth Circuit has reversed a recent panel decision finding that the consultant corollary was contrary to the "inter- or intra-agency" threshold standard in **Exemption 5 (privileges)** and has joined almost every other appellate court that has reviewed the consultant corollary in accepting it as a legitimate privilege encompassed by Exemption 5. The case involved a FOIA request from Jorge Rojas, who had been turned down for a position as an air traffic controller based on recently developed human resources policies developed for the FAA by APTMetrics, a contractor. In response to Rojas's FOIA request, the agency withheld discussions involving APTMetrics, arguing that they were protected by the consultant corollary because the contractor was acting on behalf of the agency. The district court ruled in favor of the agency, finding the records were protected by the deliberative process privilege. However, a split decision by a Ninth Circuit panel found that the consultant corollary contrary to the intent of Exemption 5 and ruled that it did not apply. The full Ninth Circuit then agreed to review that panel decision. While there were a number of concurrences and dissents among the 11 judges who heard the case, the majority agreed that APTMetrics qualified for protection under the consultant corollary. Writing for the court, Circuit Court Judge Paul Watford noted that "APTMetrics functioned no differently from agency employees who, although possessing less expertise, could have been tasked by the FAA's lawyers with preparing the same summaries. APTMetrics represented neither its own interest nor those of any other client in carrying out its work, and it did not share the documents with anyone outside the FAA's Office of Chief Counsel, just as agency employees would have been expected to keep sensitive documents of this sort in-house. With respect to preparation of the summaries, then, APTMetrics was operating enough like the FAA's own employees to justify calling its communications with the FAA 'intra-agency.'" (*Jorge Alexandro Rojas v. Federal Aviation Administration*, No. 17-55036, U.S. Court of Appeals for the Ninth Circuit, March 2)

A federal court in New York has ruled that U.S. Immigration and Customs Enforcement is not required to insert a unique identifier in place of Alien file numbers contained in data requested by the ACLU Immigrants' Rights Project concerning immigration apprehensions, detentions, removals, risk classification assessments, and bond management information because it would require the agency to **create a new record**. The agency disclosed 40 spreadsheet tabs containing over one million rows of data covering the years 2012 to 2019. However, it did not provide the unique identifiers requested by the ACLU because it did have a computer program that would allow it to replace A-numbers with unique identifiers. Judge George Daniels pointed out that two provisions of FOIA were at issue here – a requirement that agencies produce records in the format of the requester's choice as long as doing so would be "readily reproducible." The other provision was contained in the 2016 FOIA Improvement Act concerning segregability, requiring agencies to consider partial disclosure where full disclosure was not possible and to take reasonable steps necessary to segregate and release non-exempt information. Here, the ACLU argued that ICE was required to "'replace A-numbers with Unique IDs' because ICE can segregate out Unique IDs (nonexempt information) from A-numbers (exempt information) using nonburdensome computer software." In contrast, ICE argued that doing so would require creation of a record. The ACLU asserted that "one of the functions of A-numbers is to convey 'Relational Information' – information which shows the records are associated with particular individuals." The ACLU argued that FOIA required ICE to run Structured Query Language searches that would separate out this non-exempt Relational Information. Daniels pointed out that "but ICE does not maintain 'Relational Information' or 'unique identifiers' in its databases. These extrapolated data points are simply not something that ICE 'has in fact chosen to create and retain.' 'Relational Information' and 'Unique IDs' are not preexisting data fields (e.g. date, category, or title) in the [Integrated Decision Support System] database which ICE can sort. The ACLU's request for 'Unique IDs' or 'Relational Information' does not seek the contents of the database (such as A-numbers), but instead seemingly seeks information about those contents. As such it is a request that requires the creation of a new record." He added that "however, 'Relational Information' or Unique IDs cannot be 'apparent on the face of the database' because they are conceptual abstractions, not datapoints

within the IIDS." Daniels also rejected the ACLU's form or format argument. Citing *Sai v. Transportation Security Administration*, 466 F. Supp. 3d 35 (D.D.C. 2020), Daniels indicated that "form" referred to the media – such as paper or thumb drive – while "format" referred to the electronic structure for the processing, storage, or display of data – such as PDF or JPEG. Applying these definitions here, he pointed out that "ICE is correct, the ACLU's request does not implicate format (i.e. file types). Instead, the ACLU seeks to have ICE transform A-numbers into Unique IDs. Such a request is not the purpose of this section of the FOIA." (*American Civil Liberties Union Immigrants' Rights Project v. United States Immigration and Customs Enforcement*, Civil Action No. 19-7058 (GBD), U.S. District Court for the Southern of New York, March 10)

Judge Dabney Friedrich has ruled that the Department of Agriculture failed to show that records concerning H-2A visas for farmworkers were protected by **Exemption 4 (commercial and confidential)** or that either the deliberative process privilege or the attorney-client privileges covers the exemption claims that the agency made under **Exemption 5 (privileges)**. The records were requested by Farmworker Justice. By the time Friedrich ruled, the only Exemption 4 claim remaining was whether an email from the CEO of McCorkle Nurseries to the agency could be withheld under Exemption 4. Friedrich noted that under the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 2356 (2019), to fall within Exemption 4's coverage records needed to be commercial and customarily treated as confidential. Applying those standards to the email, Friedrich pointed out that "it is undisputed that McCorkle shared the same information he sent to the Department with the paid members of the Georgia Farm Bureau, which includes a membership of approximately 265,000 families. Having shared the information at issue with more than a quarter of a million people, McCorkle cannot be said to have 'closely held' it, and the contents were not 'secret' or 'private.' The information in the email was not 'known only to a limited few,' and it was 'publicly disseminated.' Because the first condition the Supreme Court established in *Argus Leader* cannot be met, the information is not confidential under Exemption 4. Any disputes related to the second *Argus Leader* condition – for example, whether McCorkle properly assumed the Department would not disclose the information he provided – are immaterial, as the Supreme Court made clear that the first condition must be met for a record to be considered confidential." Turning to the Exemption 5 claims, Friedrich indicated that the agency had failed to justify its claims under the deliberative process privilege and the attorney-client privilege, as well as the **foreseeable harm** standard. On foreseeable harm, Friedrich noted that "courts in this district frequently reject generalized explanations of harm removed from the specific information at issue. The Court will do the same here." (*Farmworker Justice v. U.S. Department of Agriculture*, Civil Action No. 19-1946 (DLF), U.S. District Court for the District of Columbia, March 4)

Judge James Boasberg has ruled that U.S. Fish and Wildlife Services has so far failed to show that **Exemption 5 (privileges)** applies to all the records it withheld from the Sierra Club concerning the status of the Florida Key deer on the agency's endangered species list. The agency disclosed 936 pages in full and 178 pages in part. The agency also withheld 251 pages under **Exemption 5 (privileges)**, including the final and draft copies of the agency's Species Status Assessment report. The Sierra Club argued that three types of records the agency was withholding under the deliberative process privilege were not deliberative – the final SSA report on the deer, the three earlier drafts of the report, and the comments and communications identifying scientific information relevant to the report. The agency took the position that all records were drafts until the final decision was published in the Federal Register. Boasberg found this definition too broad and rejected it. Instead, he pointed out that "the key deliberative-process inquiry is a functional one: courts ask whether disclosure is likely 'to stifle honest and frank communications within the agency,' not whether the document fits into a pre-determined category. Under this functional inquiry, the Court finds that release of the report would in no way 'stifle' conversation within the agency, as it contains no personal opinions, no

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recommendations, no deliberations, and nothing that would cause the agency's decisionmakers to 'temper candor' in their remarks out of 'a concern for appearances.'" He added that "the January 2018 report appears not to be a draft at all. . .In written communications, [the agency] referred to the report as 'completed in January 2018' and detailed plans to release it to the public in August 2019 after a public information meeting about the status of the deer. In the Court's view, both serve as clear indicators of finality." Boasberg indicated that the earlier drafts of the report were more likely to be deliberative but noted that "this Court has very little idea of how SSA reports are drafted, for whom, and who directs the editing process. Without any sense of the process, the Court is hesitant to rule on their deliberative nature." As a result, Boasberg gave the agency another opportunity to better explain the deliberative nature of the drafts and the relevant comments and communications. He rejected the agency's **foreseeable harm** analysis, noting that "the Court remains unpersuaded that a non-specific fear of confusion suffices to meet the agency's burden. Should FWS wish to keep the draft SSA reports and corresponding communications confidential, the Court expects a more robust justification on this score in supplemental submissions." (*Sierra Club v. United States Fish and Wildlife Service*, Civil Action No. 19-2315 (JEB), U.S. District Court for the District of Columbia, Feb. 26)

The D.C. Circuit has remanded University of Denver law professor Margaret Kwoka's request for **attorney's fees** back to the district court after finding the district court failed to weigh the personal or commercial factors in assessing an attorney's fees award in her favor, instead giving the impression that because Kwoka was writing an academic treatise on agency FOIA implementation she had both a personal and commercial motivation for her litigation. Kwoka requested data about FOIA requests processed by the IRS, including the names of third-party requesters – requesters who asked for information about another person – and the organizational affiliation of requesters if the requester provided one. The agency denied the request under **Exemption 3 (other statutes)** and **Exemption 6 (invasion of privacy)**. Kwoka filed suit and the district court ruled in her favor, rejecting both of the agency's exemption claims. But when Kwoka asked for attorney's fees, District Court Judge Dabney Friedrich found that while the public interest factor favored Kwoka, the agency's basis for withholding the records was reasonable. On the personal or commercial interest factors, Friedrich noted that Kwoka would "derive some commercial benefit from the records, and the nature of [her] interest in the records is both professional and pecuniary." Writing for the D.C. Circuit, Circuit Court Judge David Tatel observed that "both Kwoka and the IRS interpret this statement as weighing the two factors against Kwoka." Tatel, however, noted that "we agree with Kwoka that the second and third factors – 'commercial benefit' and 'plaintiff's interest' – support a fee award." Citing *Davy v. CIA*, 550 F.3d 1155 (D.C. Cir. 2008), in which the D.C. Circuit found that a journalist did not have a commercial interest in the CIA records he was seeking, Tatel noted that "in fact, Kwoka's use of the information she obtained through these requests to research trends in FOIA requests and propose improvement to agency administration represents an important type of 'public-interest oriented' scholarly endeavor that FOIA's fee provision exists to encourage. Although Kwoka plans to publish some of her analysis in a forthcoming book. *Davy* makes clear that the 'mere intention to publish a book does not necessarily mean that the nature of the plaintiff's interest is purely commercial.'" Tatel also rejected Friedrich's finding that the agency had a reasonable basis in law for claiming the records were exempt. Instead, he pointed out that "from the beginning, the IRS knew that at least some of the information Kwoka sought was not subject to section 6103. Lacking basis in either logic or fact, the IRS's argument that section 6103 exempted all of the requested information was plainly unreasonable." Sending the case back to the district court, Tatel pointed out "the district court never addressed the IRS's other argument – that at the time of Kwoka's initial request, it reasonably believed that segregating the exempt and non-exempt materials would impose an unreasonable burden." (*Margaret B. Kwoka v. Internal Revenue Service*, No. 19-5310, U.S. Court of Appeals for the District of Columbia Circuit, March 9)

Judge Colleen Kollar-Kotelly has decided to conduct an ***in camera* review** of documents withheld by the General Services Administration under **Exemption 5 (privileges)** and **Exemption 7(E) (investigative methods or techniques)** responsive to a FOIA request from CREW for communications between GSA and the White House pertaining to the renovations of FBI headquarters. Explaining her reasons for ordering the review, Kollar-Kotelly indicated that the agency's *Vaughn* index was insufficient, noting that "it does not provide enough information for the Court to determine whether the record was 'authored or solicited and received by those members of an *immediate* White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to the President on the particular matter to which the communications relate.'" Addressing the Exemption 7(E) claims, she observed that "here, neither Defendant's affidavit nor the *Vaughn* Index provide sufficient specificity pursuant to Exemption 7(E) regarding *what* investigative procedures or techniques are involved and *how* they would be disclosed by production of the documents." Because she found the agency's *Vaughn* index insufficient, she also ordered the agency to supplement its deliberative process privilege claims. Pointing out an example of the deficiency of the *Vaughn* index, she noted that "this imprecise description provides the Court no basis to determine the nature of the deliberative process involved, the function of each document in that process, or the nature of the decisionmaking authority of the document's author or recipient." (*Citizens for Responsibility and Ethics in Washington v. General Services Administration*, Civil Action No. 18-2071 (CKK), U.S. District Court for the District of Columbia, Feb. 26)

A federal court in Colorado has ruled that the U.S. Forest Service has shown that it **conducted an adequate search** for records responsive to Rocky Mountain Wild's FOIA requests concerning the development of the Wolf Creek Ski Area. The agency disclosed more that 60,000 pages in the course of processing the requests. Rocky Mountain Wild argued that the agency had improperly delegated searches to assistants. But the court noted that "it is equally likely that administrative assistants may be better suited to know where to look for responsive documents. . . If that meant that the custodian believed that delegating the task to an assistant was better, so be it." Rocky Mountain Wild also expressed disbelief that some custodians did not find records. But the court noted that "it is not true that every custodian must produce responsive documents. They were selected because they were '*likely* to have responsive records.' The standard by which the Court must judge Defendant's search is 'not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.'" Rocky Mountain Wild also faulted the agency for failing to search employees' smartphones. The court observed that "however, not all records custodians even had smartphones assigned by the agency. Those who did that did were synced to the custodian's email account. Custodians were identified because they were likely to have responsive documents and would know best where those documents would be located. Plaintiff has not made a showing that a universal search of all custodians' smartphones would reveal additional documents not already captured by Defendant's search." The court rejected the agency's attempts to withhold passcodes for conference calls under **Exemption 2 (internal practices and procedures)**. The court pointed out that after the Supreme Court's decision in *Milner v. Dept of Navy*, "it is nearly impossible to see how telephone conference numbers and passcodes would fall under Exemption 2 because that information does not concern conditions of employment in any form." However, the court upheld the agency's exemption claims under **Exemption 4 (commercial and confidential)** and **Exemption 5 (privileges)**. (*Rocky Mountain Wild, Inc. v. United States Forest Service*, Civil Action No. 18-03065-MEH, U.S. District Court for the District of Colorado, March 4)

Judge Rudolph Contreras has ruled that the IRS properly issued a *Glomar* response, neither confirming or denying the existence of records, citing **Exemption 3 (other statutes)** in response to a FOIA request from Chester and Natascha Nosal concerning their tax forms, audit records and records related to whistleblower

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complaints against them. The agency initially rejected their request because it did not contain any third-party authorizations. The Nosals then filed an administrative appeal and subsequently filed suit after the agency indicated it would take several weeks to evaluate their appeal. The IRS processed their request, issuing a *Glomar* response neither confirming nor denying the existence of records, citing § 6103, which protects taxpayer return information, for the identities of potential whistleblowers. Contreras pointed out that "the IRS appropriately issued a *Glomar* response in conjunction with Exemption 3." He explained that "if whistleblower records exist with respect to a particular taxpayer, that information tends to show that the taxpayer's return may be subject to examination. As such, whistleblower records would fall within the express terms of the statutory definition of 'return information.'" He indicated that "here, the existence of whistleblower records would communicate the factual proposition that someone submitted a whistleblower complaint to the IRS in connection with a particular individual's payment or non-payment of taxes." He observed that "only by using a blanket *Glomar* response in all situations involving whistleblower records as a category can the IRS avoid the impairment of Federal tax administration in all situations, by protecting the integrity and viability of the whistleblower program as a whole, the confidentiality of whistleblowers, and the viability of imminent or ongoing audits/investigations." (*Chester W. and Natascha Nosal*, Civil Action No. 19-1359 (RC), U.S. District Court for the District of Columbia, March 3)

A federal court in Michigan has ruled that the Michigan Immigrants' Rights Center and the ACLU of Michigan are entitled to **attorney's fees** for their FOIA litigation against U.S. Customs and Border Protection for access to records on warrantless searches and seizures near international borders. During the course of the nearly 40-month litigation, the parties managed to settle two major disputes through negotiation without court intervention. One issue was whether geographical information could be redacted under Exemption 7(E), while the second issue was a timeline for production of two categories of records. After what was supposed to be the final production of records in December 2019, the agency informed the plaintiffs that it had become aware of an additional 9,200 pages that remained unreviewed and unproduced as a result of an administrative error. The court granted an extension of time to review those documents, which was completed in February 2020. The court agreed that the plaintiffs had substantially prevailed. The court pointed out that "given the protracted amount of time that passed without receiving a satisfactory response from Defendants, filing suit was reasonably necessary for Plaintiffs to obtain the documents requested. Additionally, the fact that Defendants produced a minimal number of documents before Plaintiffs filed suit does not undermine a finding that the lawsuit was the catalyst for later productions." While the agency acknowledged that the plaintiffs were eligible for a fee award, it argued that they should not be entitled to fees for portions of the litigation for which they did not substantially prevail. The court rejected the claim, noting that "this piecemeal approach to evaluating eligibility 'is not based in the statute, which clearly speaks about eligibility to receive attorney's fees for *cases*, not particular pieces of work within a case.' Instead, the degree of a plaintiff's success on a particular piece of work is relevant to the ultimate determination of whether the entire amount of fees claimed is reasonable." The court found that the litigation was in the public interest and that none of the plaintiffs had any personal or commercial interest in the disclosure. The agency argued that the fact that the parties had been able to successfully resolve disputes indicated that it had a reasonable basis in law for its claims. The court disagreed, pointing out that "this does not necessarily establish that Defendants had a reasonable basis for withholding documents. In fact, Defendant's agreement to produce documents suggests that opposite – that they had no justifiable basis for withholding them." The court found that the hourly rates should be based on the Michigan Bar Survey. The court also found the plaintiffs' billing entries were appropriate, including a motion for sanctions that, while suggested by the court, was ultimately denied. However, the court observed that "the fact that the motion was denied does not mean it did not produce some benefit, and it certainly does not diminish the Plaintiffs' ultimate success." (*Michigan Immigrant Rights Center, et al. v. Department of Homeland Security, et al.*, Civil Action No. 16-14192, U.S. District Court of the Eastern District of Michigan, March 8)

Judge Colleen Kollar-Kotelly has ruled that Fleta Christina Sabra failed to show that she was entitled to **expedited processing** of her FOIA request to U.S. Customs and Border Protection for records concerning an alleged incident in which Sabra was detained and physically assaulted at a port of entry in Southern California. Sabra requested expedited processing, which was denied. She then filed suit, arguing that the agency had improperly denied her expedited processing request. The agency indicated that it was processing 13,794 pages of potentially responsive records as well as several hours of videotapes. The agency also indicated that it would take another two to eight months to finish processing her request. Kollar-Kotelly rejected that estimate and the agency agreed to finish processing the request within several months. But she rejected Sabra's request that she find the agency had violated FOIA by denying Sabra's expedited processing request. She noted that "because Defendant has produced records in response to Plaintiff's FOIA request, declaratory judgment that Defendant failed to comply with FOIA's time requirements at this stage, therefore, is inappropriate." Likewise, Kollar-Kotelly rejected Sabra's claim for injunctive relief finding the agency had failed to disclose the records. She pointed out that "here such an order would not have any practical effect, as Defendant has already produced responsive materials. Although the Court does not resolve at this point whether Defendant's response is 'complete' under FOIA, injunctive relief compelling Defendant to process Plaintiff's FOIA request is not warranted because Defendant has provided its response." (*Fleta Christina C. Sabra v. United States Customs and Border Protection*, Civil Action No. 20-681 (CKK), U.S. District Court for the District of Columbia, March 2)

A federal court in Vermont has ruled that the Social Security Administration has shown that Dr. Robert Shapiro's FOIA request for records concerning payments for headache treatment is **too broad** to be processed. Shapiro was a medical doctor and professor of neurological sciences at the school of medicine at the University of Vermont. The agency initially assessed Shapiro a fee of $2,908, which he agreed to pay. The agency then disclosed two memoranda and told Shapiro it was withholding 1,377 pages in total under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. After reviewing the two memoranda, Shapiro found they were not relevant. He then filed an administrative appeal of the denial and the fee assessment. The agency decided to conduct another search, which located 1,581,644 responsive pages that would require 193.311 hours to review and would cost $7 million. After Shapiro filed suit, the agency argued that he **failed to exhaust his administrative remedies**. The court rejected that claim, noting that "here, Defendant opted to respond to Plaintiff's FOIA request by producing two memoranda and withholding 1,377 pages of responsive documents under Exemptions 5 and 6. Although Defendants may have been under no obligation to process Plaintiff's FOIA request, it chose to do so and made no initial claim that it was unreasonably broad or burdensome." The court added that "even if Plaintiff's FOIA request was not perfected, Defendant's untimely response to it served as a waiver of its exhaustion defense." But the court agreed that the agency had shown that Shapiro's request was too broad. The court pointed out that "on its face, Plaintiff's FOIA request had no time limits, no document type limitations, no custodian limitations, no geographic locations, and encompassed numerous subject matters. It extends not only to documents within Defendant's offices but also between Defendant and all 'offices of other Federal Government agencies.' It was therefore clearly unreasonably broad in the breadth of records it sought." Shapiro also challenged the agency's fee assessment, arguing that because the agency had missed statutory deadlines, it was no longer entitled to collect fees related to the request. The agency argued that because a separate fee-setting regime applied, it could still assess fees. The court agreed with Shapiro, pointing out that "Defendant's interpretation would render the 2007 Amendment superfluous because it would allow an agency to charge fees regardless of whether it complied with FOIA deadlines, providing it could cite a separate statute setting fees. Defendant is therefore prevented from assessing a fee when it fails to comply with FOIA time requirements unless there is

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an exception." The court also sympathized with Shapiro's request for litigation costs but indicated that the court would need to hear more from the agency about its reasons for making its exemption claims before a final ruling on the issue of costs. (*Robert E. Shapiro v. United States Social Security Administration*, Civil Action No. 19-000238, U.S. District Court for the District of Vermont, March 8)

A federal court in Oregon has ruled that Jeremy Berryhill is not entitled to **attorney's fees** for his FOIA litigation against the Bonneville Power Administration for records concerning the agency's decision to trim vegetation on his property even though he had objected to the plan. Although Berryhill did not substantially prevail in the litigation, he filed a motion for attorney's fees on the theory that his suit had caused the agency to change its position and release five previously undisclosed records. The court found that BPA had disclosed seven redacted pages after Berryhill filed suit. But, analyzing why those redacted records were released, the court pointed out that "Berryhill has failed to establish that, but for this lawsuit, BPA would not have released the unredacted material. Berryhill has not submitted any evidence to support this assertion other than the fact that BPA released the material after Berryhill filed this action. On its own, this fact is insufficient to establish that a plaintiff's lawsuit caused the agency to disclose information." The court concluded that "the final factor weighs in favor of denying Berryhill's fee motion, as the redacted material that BPA released was protected from disclosure under the deliberative process privilege and therefore Berryhill was not entitled to this information at an earlier time. On balance, the relevant factors support a finding that Berryhill did not substantially prevail in this litigation." (*Jerome Boyd Berryhill v. Bonneville Power Administration*, Civil Action No. 19-02001-SB, U.S. District Court for the District of Oregon, March 5)

A federal court in Michigan has ruled that the Glennborough Homeowners Association does not have **standing** to pursue FOIA litigation against the U.S. Postal Service because the FOIA requests submitted to the agency identified Kathryn Marx, a resident of the subdivision, as the named requester and contained no mention of Glennborough. Glennborough, a residential subdivision in Ypsilanti, petitioned the Postal Service to change its zip code to one in Ann Arbor. USPS denied the request. Marx then submitted two FOIA requests for records concerning Glennborough's proposed zip code change. After the agency denied the request, Marx filed an administrative appeal. The agency responded by disclosing some records, but Marx contended that the response was incomplete. Glennborough then filed suit, challenging the agency's decision not to grant the zip code change, as well as the agency's FOIA responses. Although Marx's FOIA requests did not mention her affiliation with Glennborough, in its complaint she was referred to as a "Glennborough resident and member of its zip code committee." Dismissing the FOIA claim for lack of standing, the court explained that "plaintiff did not make the FOIA requests at issue in this case. Marx did. Nowhere do Marx's FOIA requests state that Plaintiff is making the request or that Marx is acting in an official capacity on behalf of Plaintiff. Furthermore, the complaint does not include an allegation that Plaintiff suffered an injury. The complaint simply states that a FOIA request was sent. Defendant did not timely respond to the request, and the responses Defendant did provide were incomplete." The court observed that "while it is in society's abstract interest to have federal agencies comply with FOIA, Defendant's alleged violations do not alone establish standing for Plaintiff." Glennborough argued that it had standing to sue and "because it has standing to sue Marx can be added as an additional plaintiff under Federal Rule of Civil Procedure 17(a)(3)." The court disagreed, noting instead that "Plaintiff lacks standing to bring this FOIA claim, and the court will not

substitute Marx into the lawsuit using Rule 17(a)(3).” (*Glennborough Homeowners Association v. United State Postal Service*, Civil Action No. 20-12526, U.S. District Court for the Eastern District of Michigan, March 8)

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