Volume 47, Number 6
March 24, 2021

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: In a discussion of the challenges incoming Attorney General Merrick Garland faces in restoring faith in the Justice Department, Bruce Brown and Gabe Rottman writing in Lawfare explore some of those challenges. On the issue of FOIA, Brown and Rottman note that "fortunately, there are plenty of ways for the Justice Department to make up for lost ground, including improving slow response times, addressing the significant backlog of cases and stopping the overuse of exemptions." The two indicated specifically that the Biden administration could be more forthcoming on the issue of journalist Jamil Khashoggi's murder.

Court Rules HHS Failed to Show Fetal Tissue Contracts Exempt

Sometimes the underlying records involved in FOIA cases are so ideologically fraught, they do not lend themselves to an easy resolution through a records request. Using FOIA to discover who had been picketing an abortion clinic, or who has been using one, is not necessarily information a participant would prefer disclosed under FOIA. Sone early cases that were particularly gut-wrenching for me when I first started editing Access Reports in the mid-1980s were several in which the government steadfastly refused to identify individuals who had been killed during covert operations to their families. Another involved whether the government should identify the parents of individuals who had been orphaned as a result of an American soldier fathering a child while stationed in England and then was killed in later fighting.

The case here is one brought by Judicial Watch against the National Institutes for Health and the Food and Drug Administration for records concerning contracts with Advanced Biosciences Resources to provide fetal tissue to use in medical research. According to Judge Trevor McFadden's opinion, ABR allegedly purchased such fetal organs from Planned Parenthood for $60 and then sold them to NIH and FDA for as much as $2,000 apiece. In response to Judicial Watch's request, the FDA produced 740 pages and the NIH produced 676 pages, some of which was withheld under Exemption 4 (commercial and confidential).

ACCESS REPORTS

Judicial Watch challenged the Exemption 4 claims. Referring to the agencies' involvement as "bloody business" and noting that the government had participated "in this potentially illicit trade for years," McFadden indicated emphatically that Exemption 4 did not apply, apparently informed in part by his belief that the contract was almost certainly illegal.

McFadden started by rejecting the agencies' claim that the records did not reflect on government operations or activities and instead were about a private company. However, he noted that "here, ABR was a supplier of human body parts to the Government and thus is implicated in the Government's activities. They were business partners. Judicial Watch wants to know how the Government used taxpayer dollars participating in this trade. This is a far cry from when the Government only acquires private documents through its role as a regulator or law maker."

Judicial Watch challenged the agencies' claims that the names and addresses of ABR's contract laboratories constituted commercial information under Exemption 4 and that unit prices and line-item amounts in contracts between ABR and the government were confidential under Exemption 4. McFadden agreed with Judicial Watch on both counts.

McFadden found that declarations supplied by the agencies and ABR did not provide sufficient evidence that the names and addresses of contract laboratories were actually commercial. The FDA's declaration talked only in terms of whether ABR *could* consider such information as commercial. But McFadden indicated that "if speculation sufficed, this litany would be fine. But the supplemental declaration says nothing about why ABR in fact has a commercial interest in the names and addresses of its contract labs." He explained that ABR's declaration was no more helpful. He pointed out that its "conclusory assertions do not suggest to the Court, even at the highest level of generality, *why* ABR has a commercial interest in the information."

He observed that "the Government has not met its burden to show that the names and addresses of ABR's contract labs are commercial in nature." He pointed out that "it was even more important for the Government (or ABR) to address the commercial nature of the names and addresses, given that this type of information is not obviously commercial." He faulted the government and ABR for their lack of supporting detail. He noted that "it bears repeating that this could have been a different case had the Government or ABR adequately explained themselves. But they did not. And ABR did not intervene to defend its interests, as companies have in similar cases. FOIA favors disclosure, and the burden to avoid disclosure rests with the Government. It did not meet that burden here."

Turning to the question of whether the agencies had shown that ABR's prices were confidential, McFadden pointed out that "Judicial Watch does not appear to dispute that, in general, unit pricing could be confidential information. It instead argues that the pricing information is no longer confidential." He explained that "recall that Judicial Watch seeks unit pricing for the years 2013-2018. Judicial Watch contends that this information is in the public domain in two ways: (a) for 2013-2015 records, through fee schedules appended to a report released by the U.S. Senate Judiciary Committee; and (b) for 2016-2018 records, through the Government's disclosures in responding to this FOIA request."

The Senate Judiciary Committee had investigated whether ABR and other tissue suppliers had violated 42 U.S.C. § 289g-2, which prohibits the transfer of human fetal tissue "for valuable consideration," an amount over the reasonable payment for associated costs. The report concluded that ABR "received payments for fetal tissue specimens far in excess of their demonstrates costs of the allowable categories." Attached to the report were ABR's fee schedules for 2010-2015. McFadden explained that "the Court finds that the fee schedules appended to the Committee's report are enough to put the information that Judicial Watch seeks for

the 2013-2015 years in the public domain." Although the agencies argued that the fee schedules did not contain the exact information requested by Judicial Watch, McFadden found the information was a sufficient match. He observed that "the unit pricing information for human fetal tissue as well as shipping and other costs disclose in the Judiciary Committee report fee schedules – corresponding with the 2013-2015 years – is thus in the public domain." McFadden then found that information disclosed by NIH in response to Judicial Watch's request also matched the information that agency had withheld under Exemption 4.

The agencies argued that to constitute an official acknowledgment the information had to be, for al practical purposes, identical. But McFadden observed that "the public-domain doctrine does not require the Court to favor form over substance. Binding caselaw shows that the relevant inquiry is whether the *information* is in the public domain, not whether it is also in precisely the same *form*." Rejecting the agencies' arguments to the contrary, McFadden noted that "even though these materials might have disclosed unit pricing in a different form, that does not mean that the *information* is not in the public domain."

In concluding, McFadden indicated that the agency had dodged a bullet because failing to provide sufficient evidence to support its exemption claims meant that he did not have to address Judicial Watch's assertion that ABR had engaged in criminal activity. He noted, however, that "the Court is dubious of the Government's argument that the exception could not apply here." (*Judicial Watch, Inc. v. U.S. Department of Health and Human Services*, Civil Action No. 19-00876 (TNM), U.S. District Court for the District of Columbia, March 11)

Views from the States

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

Colorado

A court of appeals has ruled the trial court erred by over-interpreting the provisions of the Colorado Open Records Act and the Open Meeting Act to include six finalists the Board of Regents at the University of Colorado interviewed in its search to replace CU President Bruce Benson, who had announced his plans to retire, rather than Mark Kennedy, the single finalist identified for the job at the end of the Board's search process. An outside search firm hired by the Board identified 27 candidates, of which the Board interviewed 10. After the interviews, the Board reduced the number of remaining candidates to six, all of whom were interviewed by the Board. After that round of interviews, the Board chose Kennedy as the only finalist. Kennedy was ultimately selected by a 5-4 vote of the Board. The *Daily Camera*, the student newspaper at CU, requested the names and application documents of candidates selected by the search committee and those interviewed by the Board of Regents. CU provided only Kennedy's materials, arguing that he was the only finalist for purposes of the CORA and the OML. The student newspaper filed suit and the trial court, acknowledging that the statutes were unclear on the matter of who was considered a finalist in such search contexts, ruled that the final round of six finalists interviewed by the Board constituted the finalists for the job for purposes of the access statutes. However, the court of appeals disagreed and reversed, noting that the plain language of the statutes left the decision of whom to identify as a finalist to the public body. The appeals court noted that "we fully acknowledge that, as written, and as we apply the statute, both CORA and the OML are subject to abuse by appointing entities because they can structure their appointment process to limit applicant disclosure to one finalist. Many will argue, more than plausibly, that such a structure is inimical to principles of open government. And they may be right. But again, absent underlying constitutional

ACCESS REPORTS

constraints, which do not exist here, that is for the General Assembly to address, not the courts." (*Prairie Mountain Publishing Company v. Regents of the University of Colorado*, No. 20CA0691, Colorado Court of Appeals, Mar. 4)

Indiana

A court of appeals has ruled that the Hamilton Southeastern School District was not required to provide public reasons for the disciplining of Rick Wimmer, a physical education teacher and head football coach at Fishers High School beyond what was contained in his disciplinary record. As a result of an incident with a student, which was reported to the Fishers police, Wimmer was suspended for five days without pay. WTHR TV reporter Bob Segall learned of the incident and asked the school superintendent for details of the incident. Segall was told that Wimmer was disciplined because he failed to implement instructions for classroom management strategies. Dissatisfied with that answer, Segall contacted the Public Access Counselor, who told him that the school had not sufficiently identified the factual basis for the disciplinary. When the HSE refused to provide further information, WTHR filed suit. The trial court ruled in favor of the school district. On appeal, the appeals court sided with the school district as well. The appeals court noted that "we recognize that HSE's responses to do not provide the level of detail about the incident that the police report and Wimmer's subsequent confirmation that he was suspended for that conduct do. Nevertheless, HSE's responses explained the type of disciplinary action taken, the date of the discipline was imposed, the length of the discipline, and why the discipline was issued. . .Based on the foregoing, we cannot say that the trial court was incorrect in concluding that HSE provided a sufficient factual basis to WTHR." (*WTHR-TV v. Hamilton Southeastern School District*, No. 20A-MI-1701, Indiana Court of Appeals, Mar. 10)

The Federal Courts…

Judge Christopher Cooper has ruled that the Secret Service properly invoked **Exemption 7(E) (investigative methods or techniques)** and **Exemption 7(F) (harm to a person)** to withhold records that could help identify the costs paid by the agency to the Trump Turnberry Resort in connection with President Trump's visit there in 2018. The Department of Homeland Security acknowledged the costs included $322,427 for hotel rooms. The costs of the trip were audited by the Department of Homeland Security's Office of the Inspector General after receiving a request from several members of Congress. The public version of the report contained the estimated amounts paid by the Secret Service for hotel rooms and other associated costs. However, the public version redacted the total cost of the trip as well as the number of Secret Service personnel. When CREW requested an unredacted version of the public report, the agency denied the request under 7(E), arguing that disclosing that information would allow CREW to glean insights into the number of agents used to protect Trump. Cooper first noted that the records qualified as law enforcement records. He pointed out that "such recordkeeping by the Secret Service qualifies as 'compiling' information 'for law enforcement purposes'" and added that "that the Secret Service's data were later repackaged and discussed in the OIG Report does not make the data subject to disclosure, regardless of whether the OIG Report itself was compiled for law enforcement purposes." He pointed out that the agency's affidavit indicated that 'the ability to estimate the size of a future Secret Service detail. . .would put adversaries in a better position to 'plan, disable, or circumvent the Secret Service protective techniques.' On its face, this is a logical and straightforward explanation of why revealing the number of Secret Service personnel on the trip 'might increase the risk' of future crimes targeting the Secret Service and its protectees." Further, Cooper observed that "the mosaic theory applies squarely to this case." He noted that "nothing in the record contradicts [the agency's] representation that releasing the number of Secret Service personnel on the trip could help adversaries piece together the agency's travel-staffing techniques." Cooper found that the agency

had met the **foreseeable harm** standard for both exemptions. He observed that the agency's affidavit "provides a specific explanation of how disclosure of information about the size of the President's Secret Service detail would result in foreseeable risks of harm to agents and those they protect. While CREW suggests the Court should demand an even higher degree of foreseeability, doing so would mean ignoring the D.C. Circuit's precedents defining the substantive standards under Exemption 7(E) and 7(F)." Her also rejected CREW's claim that the room rates should be disclosed. He noted that "the record supports a conclusion that the room rates would be useful for at least *estimating* the size of the Secret Service detail." He pointed out that "DHS's theory of harm from the release of the room rates is more attenuated than its argument for redacting the actual size of the Secret Service detail, since the room rates would imply only an *approximate* number of Secret Service personnel. Still, DHS's burden under Exemption 7(E) and 7(F) is modest and the agency has amply carried that burden as to room rates." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security*, Civil Action No. 20-1400 (CRC), U.S. District Court for the District of Columbia, March 17)

Judge Beryl Howell has ruled that the Centers for Medicare and Medicaid Services has not shown that it **conducted an adequate search** for records concerning 36 comments submitted during a proposed rulemaking in 1990 to implement provisions of the Medicare Secondary Payer Act. The final rule was promulgated in 1995 and specified the agency had "received 36 timely letters of comment from employers, insurance companies, law firms, actuarial firms, individuals, associations, and beneficiary rights' organizations" in response to the proposed rule. Davita, Inc. was involved in litigation over the meaning and application of the MSP Act and requested access to the comments submitted on the proposed rule, particularly the 36 comments referenced in the final rule. CMS inadvertently transposed the number for the Federal Register notice when it searched its database for repository records, concluding that the records had been accessioned to the National Archives and Records Administration. After Davita told the agency that it had incorrectly transposed two numbers, the agency conducted a new database search. Using the correct number, CMS determined that the records related to the rulemaking were in Box 14, which was in temporary storage at the Washington National Records Center and had not been accessioned to NARA. CMS manually searched Box 14, but only found records consisting of "draft copies of the proposed rule with internal agency redline edits and comments on them." None of the 36 comments sought by Davita were in Box 14. The agency issued a no records response. Davita asked for access to the contents of Box 14. However, the agency decided that since none of the 36 comments were in the box, it was not responsive to the request. Noting the requirements of the Federal Records Act for agencies to retain a permanent record of a rulemaking, Howell pointed out that "plaintiff has demonstrated that the thirty-six comments should have existed somewhere in the agency's records at the time of the search." She indicated that "when a plaintiff identifies documents not found by the agency, the agency must 'explain those holes in the record.'" She pointed out that "this requirement is not, however, an insurmountable burden for the agency. "After all, particular documents may have been accidently lost or destroyed, or a reasonable and thorough search may have missed them.' Human error of this kind does not defeat the agency's claim for summary judgment, so long as the agency has fulfilled its obligation to carry out an adequate search." As to that burden, Howell observed that "the question is not whether the agency can pinpoint the exact whereabouts of the missing documents, but whether the agency can show that its search is adequate despite its failure to retrieve known records." Howell found that the agency's explanation for its limited search was ultimately adequate. She noted that "in order to fulfill its obligations under FOIA, 'an agency need not move heaven and earth to locate and produce requested records, and this is so even when the sought-after documents are known to have existed and to once been in the agency's possession.' 'Adequacy – not perfection – is the standard that FOIA sets.'" She indicated that "defendants have met that standard with respect to their search of records in storage by using the appropriate records databases to identity Box 14 and

ACCESS REPORTS

to confirm that no other boxes are associated with the Proposed Rule or the Final Rule and then searching every page within that box. They are not obligated to undertake an untold number of searches of additional warehouse boxes, nor are they obligated, as plaintiff suggests, 'to explain why such a step would not be feasible,' in the absence of any concrete evidence the other warehouse boxes are likely to hold the comments." However, Howell found the agency had not sufficiently explained its searches of other offices and ordered the agency to supplement its declarations to provide more detail. She also rejected Davita's claim that its FOIA request could be read to encompass the records on the draft proposal. Instead, she observed that "here, by requesting 'access to' and 'copies of' the thirty-six comments made on the Proposed Rule, the FOIA Request specifically sought only the comments themselves. The plain language of the FOIA Request thus unambiguously states that this discrete set of thirty-six comments are the only responsive records." (*Davita, Inc. v. U.S. Department of Health and Human Services, et al.*, Civil Action No. 20-1798 (BAH), U.S. District Court for the District of Columbia, March 16)

Judge Carl Nichols has ruled that the Department of Justice properly withheld records concerning former Attorney General Jeff Sessions' decision to reassign the case of A.B., a Salvadoran woman whose request for asylum because of sexual abuse from her husband was denied by Sessions after he reassigned her case to himself under **Exemption 5 (privileges)**. A.B.'s application was originally denied by an immigration judge but was reversed the Board of Immigration Appeals, which remanded the case back to the immigration judge and ordered the judge to grant A.B. asylum. Sessions certified the Board's decision to himself and rejected A.B.'s application. A.B. appealed Sessions' decision to the Board, where it is still pending. After learning that Sessions had reassigned her case to himself, A.B. submitted a FOIA request concerning Sessions' decision to reassign the case. While the Justice Department also redacted personally identifying information under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, A.B. only challenged the agency's deliberative process privilege claims. She focused on a series of emails between Gene Hamilton in the Office of the Attorney General and Sarah Harris in the Office of Legal Counsel. A.B. argued that Sessions had already decided to reassign the case before the email exchange took place. Nichols pointed out that "at first glance, the Hamilton Emails could be read as if the Attorney General had decided by December 6, 2107, to certify the listed cases to himself. But in context, the emails are better construed as a communication from OAG to OLC seeking OLC's input and guidance on several issues, including whether the Attorney General should certify the cases to himself." He indicated that "to be sure, it is conceptually possible that the Attorney General could have decided in December 2017 *whether* to certify A.B.'s case, and therefore to have sought advice only on *how* to do so. But there is no indication – other than one sentence in an informal email sent between OAG and OLC – that is what happened here. The Court therefore concludes that, based on the present record, the Attorney General did not make a final decision regarding whether to certify A.B.'s case to himself until he signed the Order to do so on March 7, 2018." A.B. also argued that the fact that the emails were sent from a superior to a subordinate suggested that they were not deliberative. Nichols, however, noted that "the Court concludes that they are irrelevant to determining whether the Hamilton Emails are deliberative because a decisionmaker's communications to a subordinate, when seeking advice on whether to make a decision, are also protected by the deliberative process privilege." (*A.B. v. U.S. Department of Justice*, Civil Action No. 19-00598 (CJN), U.S. District Court for the District of Columbia, March 19)

Judge Amy Berman Jackson has ruled that the Department of Justice has now **conducted an adequate search** for records concerning veterans who are prohibited from owning firearms, that the agency properly withheld a memo under **Exemption 5 (privileges)** but that the agency must produce two redacted reports to

Congress in full. The case involved a request from the law firm Watkins Law & Advocacy. In her previous ruling in the case, Berman Jackson found that OIP's search was too limited because it failed to use relevant keywords. Addressing the second search, Berman Jackson found it was sufficient. She pointed out that "this supplemental search, a process 'in which plaintiff was both consulted and involved,' appears reasonably targeted to find documents responsive to the FOIA request." Turning to the two congressional reports, Berman Jackson explained that DOJ had redacted information because it was non-responsive. DOJ relied on *Cause of Action v. Dept of Justice*, 434 F. Supp. 3d 368 (D.D.C. 2020), in which the court accepted the agency's explanation that the records in dispute there could be logically divided by sections. Rejecting the comparison with *Cause of Action*, Berman Jackson noted that "there is nothing similar to lift the reports here out of the general rule that a responsive record must be produced in its entirety. Both documents are short reports covering a single topic related to plaintiff's FOIA request, and therefore, the Court will enter judgement in plaintiff's favor on this issue. Defendant must produce the reports to plaintiff in full, as the sections withheld provide important context that is indivisible from the rest of the document." Berman Jackson found the agency's deliberative process privilege claim applied to the withheld memo. She observed that "the memorandum was a 'direct part of the deliberative process' that was drafted explicitly to inform senior level staff of issues and provide recommendations for solutions." (*Watkins Law & Advocacy, PLLC v. United States Department of Justice*, Civil Action No. 17-1974 (ABJ), U.S. District Court for the District of Columbia, March 17)

A federal court in New York has ruled that the Executive Office for U.S. Attorneys properly withheld 27 interviews conducted as part of the Justice Department's investigation of campaign finance violations by Michael Cohen under **Exemption 5 (privileges)**. American Oversight requested the interviews, which consisted primarily of FBI 302 reports. In response to the request, EOUSA withheld 20 interviews in full and redacted portions of seven others, citing **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** as well. However, since Judge Lorna Schofield found all the exemption claims were supported by Exemption 5, she did not rule on either privacy exemption. Schofield indicated that all the records were protected by the attorney work product privilege. American Oversight argued that DOJ had waived the attorney work product privilege because the content of the interviews had been disclosed to the interview subjects. Schofield rejected that claim, noting that "the records themselves have never been disclosed by the DOJ's adversaries or the public, and the records necessarily reflect the thought processes of those who created them – including what is omitted, what is recorded, how it is recorded, how it is characterized, what is emphasized, how it is organized, and so forth." She added that "disclosing only certain of the 27 records because they reflect interviews of subject or targets of the investigation would reveal the never disclosed fact of who were the uncharged subjects and targets of the investigation." Schofield also rejected American Oversight's claim that the government had not shown that the FBI agents who conducted the interviews were covered by the attorney work product privilege. She pointed out that "representatives of a party are not limited to attorneys or attorneys' agents, but rather include 'the other party's attorney, consultant. . .or agent.' The Special Agents who drafted the interview records were unquestionably agents of the United States, the party in question in any federal criminal prosecution." (*American Oversight v. U.S. Justice Department of Justice, et al.*, Civil Action No. 19-8215 (LGS), U.S. District Court for the Southern District of New York, March 15)

Judge Dabney Friedrich has ruled that the Equal Employment Opportunity Commission has not shown that it properly responded to James Moeller's FOIA request for records concerning experience caps in employment advertisements. In its first response to Moeller's request, EEOC located 1,949 pages. It

ACCESS REPORTS

disclosed those records redactions under **Exemption 5 (privileges), Exemption 6 (invasion of privacy)**, and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency withheld three documents in full under Exemption 5. In its second response, EEOC disclosed another 1,042 pages and withheld four documents entirely. Moeller, proceeding pro se, challenged the adequacy of the agency's search. Friedrich sided with Moeller, noting that "the timeframe was imposed entirely by the Commission. It has no basis in Moeller's original request." She added that "the Commission has provided no record support for why its limitation was reasonable in light of Moeller's broad request, which included no time limit." She also faulted the agency's search terms. She pointed out that "although it may ultimately be reasonable for the Commission to exclude the terms 'advertisement' and the relevant Code of Federal Regulations citation it has not provided any explanation for why it is reasonable to exclude these seemingly relevant terms." Friedrich rejected the agency's Exemption 5 claims. She noted that "based on the Commission's scant record support for the nature of these documents, the Court is unable to determine whether or not the Commission properly withheld the documents pursuant to Exemption 5. The Commission's record support is largely conclusory, repeats the same generalized language for several different documents, and does not engage with the relevant factors under the case law." She also rejected the agency's **foreseeable harm** claims, noting that "the Commission does not articulate a specific foreseeable harm that is adequately connected to the underlying materials. Instead, the Commission repeats for every document the same generalized statement of harm that could apply to *any* record exempted under Exemption 5. These boilerplate repetitions are inadequate." (*James W. Moeller v. Equal Employment Opportunity Commission*. Civil Action No. 19-2330 (DLF), U.S. District Court for the District of Columbia, March 17)

A federal court in Massachusetts has ruled that the EOUSA and the SEC properly responded to requests from Jonathan Mullane for records concerning his law student internship with the U.S. Attorney's Office for the Southern District of Florida between January and April 2018 and his application for an internship with the Miami office of the SEC. In response to his request to the EOUSA, the agency disclosed 3,847 unredacted pages and 377 redacted pages, withholding 88 pages. The SEC located 81 pages pertaining to his internship application and subsequently disclosed an additional 241 pages of emails. Mullane argued that EOUSA's search was inadequate because it did not locate any emails pertaining to his dismissed civil suit for defamation against a publication called Breaking Media, which included charges against U.S. District Court Judge Federico Moreno and former U.S. Attorney Benjamin Greenberg. District Court Judge Denise Casper pointed out that the charges against Moreno and Greenberg were both dismissed for lack of jurisdiction and which was a matter of public record. Dismissing Mullane's claims related to the search, Casper noted that "for all these objections, Mullane's reliance on individual missing emails and documents, even if he were able to identify them, does not render a search inadequate as a matter of law. Furthermore, Mullane's belief that certain documents must exist but have not been produced is not the standard for the Court's inquiry of whether the search was adequately tailored to the request and performed accordingly." Casper approved of EOUSA's privilege claims under **Exemption 5 (privileges)**. Mullane argued that emails sent by Wendy Jacobus were not covered by the attorney-client privilege because she was not the attorney for Alison Lehr, who was Mullane's supervisor at the Miami Office of the U.S. Attorney. But Casper noted that "DOJ's description of the emails contradicts Mullane's assertion as Jacobus was involved in discussing Mullane's civil litigation against Lehr in her capacity as an attorney at DOJ, from whom Lehr sought representation and legal advice." However, Casper faulted some of EOUSA's deliberative process privilege claims, including an email exchange with the University of Miami law school about internships. Casper indicated that although EOUSA had not explained what systems of records were covered under the **Privacy Act**, she concluded that since Mullane had not pursued his administrative remedies, she did not have jurisdiction over those claims. (*Jonathan Mullane v. United States Department of Justice, et al.*, Civil Action No. 19-12379-DJC, U.S. District Court for the District of Massachusetts, March 19)

Judge Randolph Moss has ruled that the U.S. Marshals Service has now shown that it properly invoked **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods or techniques)** to withhold information from Fulvio Flete-Garcia, who had been transported while in USMS custody from the Cedar Junction facility in Walpole, Massachusetts to the federal courthouse. Flete-Garcia filed suit before the agency responded. The agency then located five pages of responsive records. It disclosed the records but redacted any personally identifying information concerning staff or fellow prisoners who were transported along with Flete-Garcia. In his earlier opinion in the case, Moss found the agency had failed to justify its search or its redactions but told the agency it could supplement its declarations. As a result, the agency conducted another search. Moss found the agency's second search was an improvement. He noted that "in contrast to the record that accompanies the USMS's previous motion for summary judgment, the record describes the nature and location of the records systems searched. The record also identifies the personnel who conducted the searches, albeit not by name, and explains why the particular divisions contacted were identified as potentially possessing responsive records." But Moss indicated that the fact the agency had misspelled Flete-Garcia's first name in its search prevented him from granting summary judgment. He pointed out that "nor can the Court determine whether the Plaintiff's last name was sufficiently unique that use of it, alone, would have located any responsive records or whether only those recorded containing his entire name (first and last) were called for by the search." He noted that "the uncertainty regarding the search terms precludes the Court from entering summary judgment at this time." The agency claimed that disclosure of internal codes would "permit people seeking to violate the law to gain sensitive knowledge and take preemptive steps to counter actions taken by [USMS] during investigatory operations." Moss indicated that "that explanation is sensible and, in the Court's view, clears the 'relatively low bar' of withholding under Exemption 7(E)." (*Fulvio Flete-Garcia v. United States Marshals Service*, Civil Action No. 18-2442 (RDM), U.S. District Court for the District of Columbia, March 24)

A federal court in Massachusetts has ruled that U.S. Customs and Border Protection has not yet shown that it **conducted an adequate search** for records concerning the agency's decision to issue an expedited removal order for Mohammad Moradi, who upon arrival at Logan Airport in Boston was told by CBP agents that he was inadmissible under the Immigration and Nationality Act. Moradi submitted a FOIA request for records concerning the expedited removal order. The agency disclosed 30 pages in response to that request. Moradi sent a second FOIA request clarifying the scope of records he requested. In response to the second request, CBP disclosed 39 pages and a final production of 189 pages. Moradi challenged the agency's search. The court agreed, noting that "although the CBP's December 2, 2020, letter provided details for their subsequent searches for emails, the [agency's] affidavit did not provide details as to those searches or those of the earlier database searches. Accordingly, although the [agency's] affidavits sufficiently indicate what was searched and by whom, additional details regarding which search terms were utilized to conduct the searches and define the scope of the search are necessary for Defendants to meet their burden." Turning to the exemption claims, the court found the agency had failed to demonstrate that some records were deliberative under **Exemption 5 (privileges)** but accepted the agency's claims made under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** and **Exemption 7(E) (investigative methods or techniques)**. (*Mohammad Moradi v. Mark Morgan, et al.*, Civil Action No. 20-10204, U.S. District Court for the District of Massachusetts, March 22)

# #

ACCESS REPORTS

Judge Randolph Moss has ruled that a FOIA request submitted by Pauline Stonehill for records concerning how the IRS responded to an earlier FOIA request pertaining to her husband Harry's estate is not prohibited by **res judicata**. The IRS asked Moss to dismiss the case, arguing the issues had already been litigated before. Moss disagreed, noting that "as to the prior FOIA litigation, the Court in unpersuaded that this Court or the D.C. Circuit resolved (or even could have resolved) the issues presented in this case, and, likewise, this lawsuit does not risk relitigating any of the issues decided in that earlier FOIA litigation, including questions of privilege. Despite the IRS's arguments to the contrary, Plaintiff could not use this case to relitigate the adequacy of the IRS's search for records responsive to her husband's earlier FOIA requests, because those earlier requests are not at issue here." The IRS argued that Stonehill was using this suit to challenge the adequacy of the agency's earlier searches for records concerning Harry Stonehill. Moss rejected that claim, pointing out that "but a FOIA request is not a challenge to anything. It is, rather, a request for records. And the doctrine of res judicata does not bar the disclosure of records under FOIA simply because those records relate to earlier litigation." He indicated that the IRS could decide to withhold records under various exemptions but observed that "for present purposes, however, it is enough to conclude that res judicata does not pose a wholesale barrier to Plaintiff's FOIA action." (*Pauline Dale Stonehill v. Internal Revenue Service*, Civil Action No. 19-3644 (RDM), U.S. District Court for the District of Columbia, March 22)

A federal court in California has ruled that the Administration for Children and Families properly responded to a three-part request from Michael Hucul for records concerning child support incentives paid to the State of California. In its first production, the agency disclosed 873 pages, including 335 pages in full and 538 with redactions under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. In its second production, the agency disclosed 1,092 pages, including 219 pages containing data about federal incentive money sent to California. ACF also disclosed 873 pages that had previously been withheld under Exemption 5 and another 83 pages of grant award notifications. Hucul then emailed the government's attorney seeking records including California's Interstate Reconciliation Report, the California Federal Case Registry, and the California Interstate Case Registry. Although it believed that records from the Office of Child Support Enforcement were not responsive to Hucul's request as written, it disclosed an additional 224 pages with redactions under Exemption 6. When Hucul challenged the adequacy of the agency's search, ACF explained to the court that child support payments were made under Title IV-D of the Social Security Act and thus were not considered responsive to Hucul's request. The agency pointed out that "incentive payments are not funded by, nor paid to, any State for use as any form of child support payments" and that "incentive payments are not funded by, nor paid to, any parent regardless of whether they are custodial, joint-custodial, or non-custodial." Further, the agency indicated that "in addition, states are not required to, nor do they, certify the purpose for which child support incentives are received." Hucul argued the agency misinterpreted his FOIA request. But the court agreed with the government that "a reasonable interpretation of Plaintiff's request is producing documents where California 'certified the child support incentives they received by "non-custodial parents" and/or "custodial or joint-custodial parents." A reasonable reading of the FOIA request does not support Plaintiff's argument that he sought the underlying child support orders to include the parent's name, custodial status of the parent and the case numbers." Hucul argued that if the agency needed to clarify its interpretation of the request, it was required under FOIA to contact the requester. ACF argued that *Kowalczyk v. Dept of Justice*, 73 F.3d 386 (D.C. Cir. 1996), held that agencies were not obligated to change their interpretation of a request based solely on a requester's clarification. The court pointed out that "while persuasive, the Court notes that in this case, Plaintiff does not seek to clarify his original request but instead sought to expand his original request. The Court concludes that Defendants conducted an adequate search and that they did not have a duty to seek clarification before or after they produced

responsive documents." (*Michael Hucul v. United States Department of Health and Human Services, et al.*, Civil Action No. 20-0035-GPC (AGS), U.S. District Court for the Southern District of California, March 15)

A federal court in Colorado has ruled that the IRS properly responded to 13 FOIA requests from Rifle Remedies concerning the agency's tax audit of the company as well as guidance pertaining to the implementation and enforcement of § 280E and the agency's examination of marijuana vendors in states where marijuana sales are legal. The agency located 2,670 pages of responsive documents and disclosed 2,572 pages in full, 65 documents in part, and withheld 78 documents in full, citing a variety of exemptions. Rifle Remedies challenged the **adequacy of the search** as well as claims under **Exemption 3 (other statutes), Exemption 5 (privileges),** and **Exemption 7 (law enforcement records)**. The attorney for Rifle Remedies submitted an affidavit alleging that someone at the IRS had told him that the agency had a policy manual pertaining to § 280E, and the fact that the agency disclosed no records on the policy indicated the search was insufficient. The court, however, pointed out that Rifle Remedies' attorney "has narrowed down the possible informers, but similarly has not identified who told him of the existence of the § 280E manual. As a result, plaintiffs have not provided 'concrete evidence' of the existence of the § 280E manual" and added that "the Court finds that plaintiffs have not rebutted the presumption of good faith that attaches to agency declarations regarding a § 280E manual." Rifle Remedies also argued that the IRS should have asked the National Archives and Records Administration to conduct a search for potentially relevant records from 1996. The court disagreed and pointed out that NARA was only responsible to search for records that had been legally transferred to its custody. Since the IRS had testified that the records would have destroyed rather than officially transferred, the court observed that "these potentially responsive documents at NARA thus [would require a direct request to NARA] and the IRS was not required to search NARA records." The IRS withheld feedback reports related to § 280E enforcement entirely because they contained third party taxpayer information under § 6103. Rifle Remedies argued the agency should have redacted third party data and disclosed the non-identifying portion. The court indicated that "because the feedback reports were taxpayer specific, the IRS was under no duty to redact only the taxpayer specific information and instead was permitted to redact the documents in their entirety." The court approved the agency's withholdings under Exemption 5. Explaining one withheld document, the court noted that "the IRS states that the communications contain suggested legal arguments and defenses to the petitions to quash. Because that litigation is ongoing and the pages reflect opinions and recommendations regarding legal theories, they are pre-decisional and deliberative. Additionally, the IRS withheld part of page 2384 because it was an email from an IRS attorney to a revenue agent regarding the appropriate course of action to take on an audit while a petition to quash the summons was pending in court." Rifle Remedies challenged the agency's use of **Exemption 7(A) (interference with ongoing investigation or proceeding)**, arguing that the agency's explanation in its *Vaughn* index was too vague. The court disagreed and noted that "the withheld documents relate to the nature, scope, and direction of the ongoing audit. The Courts finds that this information provides enough detail for the Court to conclude that the documents are properly withheld under Exemption 7(A)." (*Rifle Remedies, LLC v. Internal Revenue Service*, Civil Action No. 18-00949-PAB-GPG, U.S. District Court for the District of Columbia, March 16)

Judge Emmet Sullivan has ruled that the FBI, the DEA, the BATF, and the EOUSA all properly responded to Darwin Huggans' FOIA requests for records about Anthony Lamar Stiles, who had testified during his drug trial in Missouri. Although Huggans did not provide any third-party authorization from Stiles, he instead attached portions of a transcript from his trial indicating that Stiles had been identified as a confidential informant during Huggans' trial. All four agencies issued *Glomar* responses neither confirming

ACCESS REPORTS

nor denying the existence of records. They also relied on the categorical denial, stemming from *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), which allows agencies to categorically withhold records identifying individuals' involvement with law enforcement agencies absent a strong showing of public interest under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Huggans argued that Stiles had waived any protection by testifying at his trial. But Sullivan found that "Stiles does, in fact, maintain a privacy interest for documents in his name, and that any responsive documents sought would necessarily reveal new information about Stiles's involvement with law enforcement endeavors." He indicated that "such information is, on its face, 'categorically' protected from disclosure under exemption 7(C), absent Plaintiff's showing that 'a significant public interest exists for disclosure.'" Huggans analogized the situation with the records exclusion provision in section (c)(2), which allows agencies to refuse to process requests for confidential informant information unless the informant has been officially acknowledged. Sullivan pointed out that the exclusions were not relevant here, noting that "none of the Defendants rely on the Section 552(c)(2) exclusion, they have withdrawn their reliance on *Glomar*, and while a categorical denial may be similar, it is not equivalent. Defendants have ultimately treated the request under applicable FOIA exemptions and justified those exemptions through sworn affidavits." Huggans claimed that Stiles' identity as a confidential source had been officially acknowledged on the public record. Sullivan disagreed, noting that "there is a disconnect here between what Plaintiff actually seeks and what he claims is public record, and without more information, 'this borders on the "all-encompassing fishing expedition" on which a FOIA requester cannot embark.'" (*Darwin Huggans v. Executive Office for United States Attorneys, et al.*, Civil Action No. 19-02587 (EGS), March 22)

Judge Rudolph Contreras has ruled that the National Security Council's Records Access and Information Security Management Directorate is not an **agency** subject to FOIA because its parent agency – the National Security Council – is not subject to the statute. Legal Eagle, a business that operates a YouTube channel focused on legal issues, requested records related to the prepublication review of former National Security Advisor John Bolton's book on his experiences working for former President Donald Trump. Legal Eagle filed suit against several agencies that are part of the intelligence community and also filed suit against RAISMD. The government filed a motion to remove RAISMD as a defendant, arguing that, as a component of the NSC, it was not subject to FOIA. Legal Eagle argued that *Armstrong v. Executive of the President*, 90 F.3d 553 (D.C. Cir. 1996) and the more recent decision, *Main Street Legal Services v. NSC*, 811 F.3d 542 (2d Cir. 2016) "only determined that the NSC as a whole is not subject to FOIA but left open the possibility that subcomponents of the NSC might be subject to FOIA if they are sufficiently independent." Contreras sided with the government. He noted that "the Court perceives no invitation in this Circuit's binding precedent to reevaluate whether subcomponents of the NSC, an entity that itself has been found to not 'exercise *any* significant non-advisory function,' are agencies subject to FOIA. Although *Armstrong* did not specifically discuss prepublication review or RAISMD, the court did consider the NSC's role in protecting classified information." (*Legal Eagle, LLC v. National Security Council Records Access and Information Security Management Directorate, et al.*, Civil Action No. 20-1732 (RC), U.S. District Court for the District of Columbia, March 18)

Judge Colleen Kollar-Kotelly has ruled that the Bureau of Prisons properly withheld records under **Exemption 7(C) (invasion of privacy concerning law enforcement records)** pertaining to the agency's decision to suspend prisoner Isaac Kelvin Allen's privileges to use the Trust Fund Limited Inmate Communications System, which allows prisoners to communicate with others outside the facility via email. The agency suspended Allen's privileges for 21 years after discovering that he was using the system to help other prisoners file false IRS returns. The agency withheld User IDs, explaining that each staff is assigned "a

unique USER ID that allows [him or her] to log into BOP's network, including the staff email system. . ." Kollar-Kotelly agreed with the agency that the User IDs were protected. She noted that "all USER IDs 'begin with the same letters but have unique numbers assigned.' Each USER ID is unique to an individual and contains 'personally identifiable information. . .tied to a specific staff member.'" She added that "the Court identifies no public interest in disclosure of the USER IDs, and certainly no public interest sufficient to outweigh the privacy interest of BOP staff members." (*Isaac Kelvin Allen v. Federal Bureau of Prisons*, Civil Action No. 16-0708 (CKK), U.S. District Court for the District of Columbia, March 24)

Judge Amit Mehta has ruled that the National Archives and Records Administration violated the Administrative Procedure Act by failing to justify its decision to dispose of a number of files maintained by U.S. Immigration and Customs Enforcement. In response to its first notice that it intended to dispose of the various files, NARA received a number of comments arguing that the retention period for the records should be extended or the records should be preserved permanently. NARA then provided a second notice for comments. In response to those comments, NARA proposed retention schedules ranging from permanent retention for OPR Death Review Files, 25-year or 20-year retention schedules for Sexual Abuse and Assault Files and ERO Death Review Files, but only seven years for three files, and three years for another. NARA indicated that it had concluded those files with seven to three-year retentions periods would experience their most use early on and thus did not need longer retention periods. CREW challenged the agency's decision to dispose of the files, arguing that they had historical significance for researchers. Mehta found NARA had not adequately explained its reasons for the retention periods. He pointed out that "here, NARA was required by both the governing statutes and the agency's Appraisal Policy to consider the research value of the records in ICE's Disposition Schedule, and it failed to meaningfully do so." He noted that "the record before this court, however, does not reveal that NARA considered current research use or made inferences about the anticipated use of the documents in future research." He observed that "without 'an "attempt at explanation or justification" this court is left with no means of discerning whether the agency actually considered the research value of the records on ICE's Disposition Schedule.'" He remanded the schedules back to NARA for reconsideration. (*Citizens for Responsibility and Ethics in Washington, et.al. v. National Archives and Records Administration, et al.*, Civil Action No. 20-007389 (APM), U.S. District Court for the District of Columbia, March 12)

# #

ACCESS REPORTS

1624 Dogwood Lane, Lynchburg, VA 24503 (434) 384-5334

Please enter our order for Access Reports Newsletter and/or Reference File, the two-volume, loose-leaf Reference Service. It will help us stay on top of developments in FOI and privacy. We may cancel for any reason and receive a refund for the unmailed issues.

- ❑ Access Reports Newsletter for $400
- ❑ Bill me
- ❑ Check Enclosed for $_____

Credit Card
Master Card / Visa / American Express
Card # _____-_____-_____-_____ Expiration Date (MM/YY):_____/_____
Card Holder:_____ Phone # (_____) _____-_____

Name: _____ Phone#: (____) _____-_____
Organization: _____ Fax#: (____) _____-_____
Street Address: _____ email: _____
City: _____ State:_____ Zip Code: _____