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Washington Focus: Rep. Carolyn Maloney, chair of the House Oversight and Reform Committee, introduced the Presidential Records Preservation Act (H.R. 1929) as part of the opening of Sunshine Week in March. The bill would require the president, vice president, and White House senior officials to "make and preserve" records that track the president's official activities. The bill would also require White House officials to establish specific records management controls to capture and preserve electronic records and make them easily searchable and accessible. In a video introducing Sunshine Week, Maloney observed that "open government and freedom of information are fundamental to a functioning democracy. The public deserves to know about the actions of their government in order to hold the government accountable."

Court Finds Agency Failed to Justify Exemption 4 Claims

A recent decision from the Southern District of New York serves as a reminder of how unsettled some aspects of Exemption 4 (commercial and confidential) remain in the aftermath of the 2019 Supreme Court decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in which the Court abandoned the substantial harm test that first appeared in the D.C. Circuit's 1974 *National Parks* decision because it was not supported by the plain language of Exemption 4, concluding instead that records were protected under Exemption 4 when they contained commercial information that had been submitted with an expectation of confidentiality. However, since the government had assured confidentiality for the data at issue in *Argus Media* if the Supreme Court ruled in favor of the trade association, the Court did not go into detail about what needed to be shown to establish confidentiality, indicating instead that it was more than just asserting that information was confidential but less than an explicit assurance of confidentiality from the agency.

The case involved two requests from *New York Times* reporter Sheila Kaplan for records concerning Juul Labs, particularly the use of its products by minors. Kaplan submitted her requests after the FDA sent a letter to Juul requesting records under Section 904(b) of the Food, Drug, and Cosmetic Act related to Juul's marketing practices,

research on marketing, public health impact, and adverse experiences and complaints, Kaplan submitted a FOIA request to the agency for records obtained from Juul in response to the FDA's request. She submitted a second request for records concerning marketing, advertising, and sales strategy records obtained by the FDA from Juul during its inspection of the company's headquarters in September 2018. The agency told Kaplan that it had sent a pre-disclosure notification letter to Juul pertaining to records responsive to her first request but that because its inspection had not yet been completed, it was withholding records responsive her second request under Exemption 7(A) (interference with ongoing investigation or proceeding). Based on an Index of Document Categories provided by Juul to the FDA in response to its pre-disclosure notification letter, Kaplan told the agency the *Times* would contest the Exemption 4 claims for a category entitled Consumer Experience.

District Court Judge Valerie Caproni found the FDA had "failed to demonstrate the commercial nature of these records. Neither customer nor non-customer complaints are properly classified as commercial information under Exemption 4, at least as described in this case. Juul's internal classification and analysis of these complaints *may*, however, be appropriately described as commercial and therefore entitled to protection under Exemption 4. Because the FDA has failed to provide sufficient details on the nature of any internal Juul communications or analysis, the Court cannot make a reasoned determination that this information qualifies as commercial. FDA has also failed entirely to address whether Juul's internal analysis can be segregated from the complaints themselves."

The FDA argued that the complaints were protected under *Public Citizen v. Dept of Health and Human Services*, 66 F. Supp. 3d 196 (D.D.C. 2014), in which the court found that disclosure log summaries submitted by pharmaceutical companies in annual reports were commercial. But Caproni observed that "this Court does not read *Public Citizen* to stand for the extremely broad proposition suggested by the FDA that *any* interaction between a company and its customers is necessarily commercial information." Instead, she noted that "it is not the bare interaction between a company and its customer that makes the interaction commercial; the interaction is commercial because of what it reveals about the company's internal or income-producing activities." She indicated that "the same cannot be said for one-sided interactions *to the company*. Such a complaint, without more, does not threaten to reveal anything about a company's internal operations and is meaningfully different than a sales meeting between a salesperson and a customer."

She also faulted the FDA's description of records characterized as internal Juul analysis and communications. She indicated that the agency's current *Vaughn* index was insufficient to carry its burden of proof on the issue of whether these records were commercial. She pointed out that "although these records may contain information appropriately classified as commercial under Exemption 4, because neither FDA's amended *Vaughn* index nor the [agency's] declaration provides an adequate foundation for Court review, summary judgment for the FDA is inappropriate at this time."

Noting that the Supreme Court's decision in *Argus Media* had left unsettled the required assurances of confidentiality the agency and the business submitter needed to show, Caproni rejected the FDA's claim that *Argus Media* "instructs courts to focus on how the person who provides the documents to the Government treats them. Here, the FDA argues, Juul is the 'person' that provided the records to FDA, and Juul itself treats these records as confidential. That, FDA argues, ends the inquiry." Instead, Caproni noted that "it strains credulity to believe that Juul treats customer and non-customer complaints and Juul's responses as highly confidential information." She explained that "where third-party disclosure has been deemed consistent with the finding that a company treated the information as confidential, there has been some accompanying indication that the company took steps to ensure that the information remained closely held or guarded, or there was at least an implicit understanding that the information would remain limited to a select audience." She observed that "without any indication from FDA or Juul that complainants submitted their complaints to

Juul with an understanding that the complaints were to be kept confidential, the Court finds no reason to stamp them with a label of 'confidential information.'"

Caproni, however, agreed the agency had provided an explicit assurance of confidentiality to Juul in its letter requesting records under Section 904(b). The *Times* argued that the agency's assurances of privacy were nothing more than a recitation of the standard under Exemption 4 and that to satisfy the confidentiality prong of *Argus Leader*, the government needed to provide "a particularized promise of confidentiality, specific to the documents provided." The *Times* also contended that under the broad standard enunciated by the FDA, a company could claim confidentiality for any document submitted. Caproni noted that "but Plaintiffs ignore a third option, in which an agency's records collection is accompanied by an express notice of its intention to *make public* the collected records. In that scenario a company cannot reasonably claim to have received an assurance of privacy, because there would be no expectation that *any* information submitted, regardless of whether it otherwise meets the hallmarks of confidential commercial information under Exemption 4, would be kept private by the agency." (*New York Times Company and Sheila Kaplan v. U.S. Food and Drug Administration*, Civil Action No. 19-4740 (VEC), U.S. District Court for the Southern District of New York, March 29)

Court Rejects Policy or Practice Claim But Rules Agency Failed to Show Confidentiality

In a case brought by the American Society for the Prevention of Cruelty to Animals challenging the response of the Animal and Plant Health Inspection Service to 76 FOIA requests submitted by the ASCPA concerning the Animal Welfare Act, Judge Naomi Buchwald of the Southern District of New York found that the agency failed to justify its claims under Exemption 4 (commercial and confidential) but accepted most of its Exemption 5 (privileges) claims. She also rejected the organization's claim that the agency had a policy and practice of violating FOIA.

Many of the requests submitted by the ASCPA dealt with annual license renewal applications from animal dealers, known as Form 7003. Under Exemption 4, the agency redacted information submitted by dealers regarding their revenue, the number of animals sold, and their annual license fee, which is calculated based on a dealer's revenue. In response to an ASCPA request for records pertaining to the agency's 2017 inspection and enforcement actions taken against Ruby Fur Farm, the agency also redacted information under the attorney-client privilege. The ASPCA's policy and practice claim was based on the agency's failure to respond to 30 requests within the statutory time limit. The agency's inability to respond to requests for inspection reports was exacerbated after the agency decided in February 2017 to no longer post reports online but to require FOIA requests instead. That increased the agency's backlog by over 1,000 requests by the end of 2018.

In 2019, the Supreme Court decided *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), in which the Court abandoned the substantial harm test first articulated in the D.C. Circuit's 1974 *National Parks* decision, because it was not supported by the plain language of Exemption 4. Instead, the Court indicated that records were protected by Exemption 4 if they were both commercial and confidential. The Court, however, provided little guidance on how to determine the applicability of either prong, but indicated that a clear assurance of confidentiality by the agency would be adequate to show the records were treated as confidential. Buchwald focused on the confidentiality prong of Exemption 4, explaining that the agency had shown the submitters treated the data included on Form 7003s as confidential. But Buchwald noted the agency had provided no evidence regarding government assurances of confidentiality, arguing instead that there was no need to require that the confidentiality prong was satisfied. However, Buchwald

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pointed out that "while the Supreme Court in *Argus Leader* did not resolve the issue of whether government assurances are *necessary* to satisfy Exemption 4, such assurances are indisputably *relevant* to the Exemption 4 analysis."

Buchwald then explained that "here, though, the Court need not decide whether government assurances of confidentiality are required. That is because, at the time the dealers submitted the Form 7003s in question, the Agencies took the public position that they would *not* treat Block 10 information as confidential" based on the ruling by the D.C. Circuit in a reverse-FOIA decision in *Jurewicz v. Dept of Agriculture*, 741 F.3d 1326 (D.C. Cir. 2014), in which the government took the position that the Block 10 data was publicly available. Buchwald indicated that "it still stands to reason that if government assurances of privacy convey confidentiality for the purposes of Exemption 4, then government assurances of publicity vitiate the same. The Court therefore joins the growing chorus of opinions reasoning that Exemption 4 does not apply when an agency publicly acknowledges that it will not treat information as confidential, a conclusion that is even endorsed by the Department of Justice's official guidance on Exemption 4 in the wake of *Argus Leader*."

While Buchwald questioned some of the agency's privilege claims under the attorney-client and deliberative process privilege, she ultimately accepted that they were protected, including after examining them in light of the foreseeable harm standard.

However, she rejected the ASCPA's policy and practice claim. She indicated that she accepted the D.C. Circuit's precedent in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988), including its recent ruling in *Judicial Watch v. Dept of Homeland Security*, 895 F.3d 770 (D.C. Cir. 2018), finding that a consistent failure to respond on time could qualify as a policy and practice claim. She agreed that the agency's 2017 decision to prohibit online access to data from Animal Welfare Act inspection reports had caused the agency's consistent failure to meet its statutory deadlines. But in Section 788 of the Further Consolidated Appropriations Act of 2020 Congress legislatively prohibited APHIS from continuing to fail to make the AWA inspection report data available online. As a result, Buchwald noted that "because Congress already acted to address the Agencies' policies and practices adopted on February 3, 2017, that underline the ASPCA's claims, the APSCA has not established that the Court must intervene to correct a policy or practice that Agencies have in place that 'will impair [APCA's] lawful access to information in the future." (*American Society for the Prevention of Cruelty to Animals v. Animal and Plant Health Inspection Service, et al.*, Civil Action No. 19-3112 (NRB), U.S. District Court for the Southern District of New York, March 25)

The Federal Courts…

The D.C. Circuit has ruled that the DEA is not required to convert GPS coordinate data into maps because to do so would require the agency to **create a new record**. Wrapping up the last of prisoner Stephen Aguiar's appeals pertaining to his request for records concerning how the DEA was able to track his movements as part of a drug investigation in Vermont, the D.C. Circuit rejected his claim that converting the GPS data into a more useable map was permissible under the **choice of form or format** provision that was part of the 1996 EFOIA amendments. Amicus curiae Stacie Fahsel, who had been appointed by the D.C. Circuit to argue the form or format claim on behalf of Aguiar, claimed that the 351 spreadsheet pages listing latitude and longitude coordinate data generated by the GPS tracking device was simply a way to describe where on the map something is located. Fahsel argued that "anything that presents the same underlying information without altering its substantive content is another 'form or format' of a record." In contrast, the DEA argued that the record was a spreadsheet of numerical coordinates and that any map images would constitute "new records with additional and expanded content." After reviewing the legislative history of the EFOIA amendments,

Circuit Court Judge Judith Rogers explained that "interpreting § 552(a)(3)(B) [the form or format provision] as imposing such an obligation on agencies in the circumstances here would likely also be in tension with this court's precedents holding that FOIA does not obligate agencies to 'add explanatory material to a document' and that a FOIA 'requestor must take the agency records as he finds them.' Likewise, our precedent construing agencies' disclosure obligations under FOIA generally has not held them to vary with the characteristics or convenience of the requestor." Rogers indicated that "the court leaves open the question whether and under what circumstances a duty of production would arise under FOIA when an agency technically stores information in one way, such as numerically as GPS coordinates, but typically accesses that information in another way, such as graphically as maps. Congress was acutely aware when it enacted the 1996 amendments that FOIA would apply to 'yet-to-be invented technologies.' Because evolving practices of data storage and use may blur the line between existing records and new ones, the court does not decide whether a map generated from coordinates in the agency's possession might, under circumstances not presented here, be another 'form or format' of an agency record." She noted that "whatever that line, the record before this court shows that to produce the maps requested by appellant – like those viewed by DEA agents during their investigation or those introduced at appellant's trial by the U.S. Attorney's Office – DEA would have to create records. As DEA suggests, producing the requested maps would require editorial judgment on DEA's part." (*Stephen Aguiar v. Drug Enforcement Administration*, No. 18-5356, U.S. Court of Appeals of the District of Columbia Circuit, Apr. 2)

Judge Rudolph Contreras has ruled that a 2020 speech by Department of Defense General Counsel Paul Ney at Brigham Young University Law School defending the legality of the U.S. drone strike that killed Iranian General Qassem Soleimani while he was visiting Iraq did not constitute a **waiver of privilege** concerning the decision to kill Soleimani. However, he decided to review the memo *in camera* to determine the extent to which Ney's speech might have waived privileges for portions of the OLC Memo. Shortly after the strike, the Protect Democracy Project submitted a FOIA request for records pertaining to the decision. PDP eventually narrowed its request to a memorandum prepared by the Office of Legal Counsel at the Department of Justice memorializing the legal advice given to President Trump's national security advisors prior to the strike. The agency withheld the memo under **Exemption 5 (privileges)**, citing the presidential communications, attorney-client, and deliberative process privileges. PDP argued that communications with Congress, and particularly Ney's speech at Brigham Young University, constituted adoption of the memo's conclusions. Contreras, however, noted that "none of these statements constituted public adoption of the OLC Memo. Two of the three did not even mention the memo, much less 'expressly adopt or incorporate [it] by reference.' And Ney did little more in his speech. He did not single out the OLC Memo specifically or state that it embodied Executive Branch policy." PDP claimed that portions of the statements seemed to echo the language of the OLC Memo. But Contreras pointed out that "to infer a common source of reasoning from the fact that the statements share that high-level conclusion – or any others – would create a backdoor around precedent. . ." He added that "and because the similar excerpts the Project focuses on do not even mention the OLC Memo, it is speculative to attribute them to the memo anyway." Indicating that he would review the memo *in camera*, Contreras noted that "as things stand, the Court lacks the information it needs to determine the extent to which Ney's speech disclosed the OLC Memo's contents, if at all. The Court has not viewed the memo. And the Government has not provided a detailed enough declaration to help the Court make that determination." (*Protect Democracy Project, Inc. v. U.S. Department of Justice, et al.*, Civil Action No. 20-172 (RC), U.S. District Court for the District of Columbia, March 26)

Judge Timothy Kelly has ruled that the Fish and Wildlife Service failed to show that records related to importers and exporters of wildlife are confidential for purposes of **Exemption 4 (commercial and confidential)**. The case involved a request from Humane Society International for data elements on importers

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and exporters contained in the agency's Law Enforcement Management Information System (LEMIS). The only remaining issue when Kelly ruled was whether redacted information was protected by Exemption 4. Kelly noted that the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct 2356 (2019) held that one element government agencies were required to show was that the withheld information was treated as confidential. Kelly noted that although FWS had provided declarations from the affected importers/exporters, they did not meet the personal knowledge standard in Rule 56. He pointed out that "nearly all the objections the Service submitted were not notarized and were not made under the penalty of perjury, thereby constituting inadmissible hearsay. Defendants make no argument explaining why the Court should consider their content, nor have Defendants requested time to cure them despite knowing about this issue for over a year since HIS first raised the issue in its first motion for summary judgment." Kelly also explained that the declarations were substantively deficient. He observed that "these representations echo the old *National Parks* standard and have little, if any, relevance now. Perhaps they circumstantially suggest that the company *should* keep the information private, but they hardly shed light on whether the company does so." In contrast to the deficient declarations, Kelly indicated that two objectors – BioIVT, LLC and Oregon Health & Science University – had shown that their information was customarily kept confidential. Although *Argus Media* had not addressed the issue of whether an agency was required to provide the submitter with assurances of confidentiality, Kelly indicated that a Privacy Act notice addressing the database informed submitters that data could be disclosed in response to a FOIA request. Finding that dispositive, Kelly noted that "in effect, then the notice *disclaimed* confidentiality, rather than provided an assurance of it. And given what Defendants actually told these companies through the Privacy Act Notice, their representations about what they would have told them if given a do-over are simply of no moment." (*Humane Society International v. United States Fish and Wildlife Service, et al.*, Civil Action No. 16-720 (TJK), U.S. District Court for the District of Columbia, March 29)

In the first application of the holding in the recent Supreme Court ruling in *Fish and Wildlife Service v. Sierra Club*, 140 S. Ct. 1262 (2021), in which the Court found that a draft biological opinion prepared by FWS as required by the Endangered Species Act in response to a proposed EPA regulation was covered by the deliberative process privilege because it was never acted upon by the EPA, Judge Amy Berman Jackson found that biological opinions created under similar circumstances were privileged as well because of the Supreme Court's ruling. The case involved two FOIA requests submitted to the EPA and the FWS by the Center for Biological Diversity for records concerning missing biological evaluations and opinions pertaining to the regulation of the pesticides chlorpyrifos, malathion, and diazinon. The EPA produced 848 records, releasing 324 in part, and withholding 296 records in full the FWS produced 6,779 records in full or in part and withheld 1,451 records in full. CBD challenged the agencies' withholding of seven documents under **Exemption 5 (privileges)**, focusing on two 2017 EPA draft biological evaluations, particularly the Draft Bee Data Excel Workbook, and three FWS draft opinions and their appendices. EPA argued that despite the level of polish of two draft BEs, they were privileged because they were never adopted because the agency ended up revising its regulation instead. Berman Jackson found the facts here essentially identical to those in the Supreme Court's *Sierra Club* decision. She indicated that "the April 2017 drafts do not communicate a policy on which the agency has settled. They may have been close to publication, but until the agency approved them or disseminated them as the next step in the process, the developmental drafts remained subject to revision and were thus predecisional." Berman Jackson then found that the EPA had shown that disclosure would cause **foreseeable harm** but also indicated that the agency had failed to **segregate** the documents. She pointed out that "while the Court will enter summary judgment in favor of the defendants and deny plaintiff's motion on the question of whether the records are exempt, the agency must produce a redacted version disclosing purely factual information, or other materials that can be segregated. . .or submit a more detailed explanation as to why that would be impossible." (*Center for Biological Diversity v. U.S. Fish and Wildlife Service, et al.*, Civil Action No. 18-0342 (ABJ), U.S. District Court for the District of Columbia, March 31)

Judge Randolph Moss has ruled that INTERPOL Washington, U.S. National Central Bureau properly invoked **Exemption 7(D) (confidential sources)** to withhold 11 pages that originated from another foreign NCB in response to requests from Lori Shem-Tov, the defendant in a criminal prosecution in Israel for publishing personal information about Israeli judicial and government officials and individuals on her blog entries, accusing them of abusing their children and children under their care. In a previous opinion, Moss indicated the USNCB had failed to justify its Exemption 7(D) claims. Moss first addressed the issue of whether the records qualified as law enforcement records. He noted that 'were the records at issue compiled for the purpose of enforcing federal law, the threshold requirement would be easily met. Here, however, the records were received from a foreign state (or included communications with the foreign state) for the purpose of assisting the state in its own investigation and prosecution arising from alleged violations of the foreign state's criminal law. The first question, then, is whether the phrase 'for law enforcement purposes' as used in Exemption 7, includes the enforcement of the criminal law of a foreign state." He indicated that *Bevis v. Dept of State*, 801 F.2d 1386 (D.C. Cir. 1986), in which the D.C. Circuit concluded Exemption 7(D) applied to records concerning the investigation of the murders of three American nuns in El Salvador, was directly on point. Applying *Bevis*, Moss noted that "the fact that the information at issue here was provided to the USNCB by a foreign NCB to assist *a foreign law enforcement investigation* does not undermine the conclusion that the information was 'compiled for law enforcement purposes.' The USNCB needed information from the foreign NCB 'for the purpose' of guiding and coordinating the U.S. efforts to obtain the requested information for the foreign NCB. That was a 'law enforcement' purpose, and nothing more is necessary to satisfy the threshold requirement of Exemption 7." The next question that needed to be addressed was whether a foreign state seeking information from the United States constituted a source. He noted that "in *seeking* assistance, an entity can also qualify as a *source*, because the request for assistance itself conveys confidential information that the responding entity needs to provide the requested assistance." Moss pointed out that "although the documents withheld in part pursuant to Exemption 7(D) did not directly originate from the foreign NCB, they included the same type of information and, at times, merely forwarded material provided directly by the foreign NCB. In short, the foreign NCB was, in fact, the 'source' of the information at issue, and that information was provided to the USNCB and DHS for a 'law enforcement purpose' – namely, to inform the U.S. law enforcement authorities about the nature and focus of the foreign state's investigation, so they could assist the foreign authorities in that investigation." Shem-Tov argued that public disclosure of much of the material at issue had waived any 7(D) protections. However, Moss indicated *Irons v. FBI*, 880 F. 2d 1446 (1st Cir. 1989), in which the First Circuit ruled that public testimony of confidential sources did not waive Exemption 7(D) protections, and its subsequent acceptance by the D.C. Circuit in *Parker v. Dept of Justice*, 934 F. 2d 375 (D.C. Cir. 1991), held otherwise. Shem-Tov pointed to examples of disclosure of some relevant information, but Moss explained that "even if these sources disclosed some or all of the information at issue or the identity of the foreign NCB, they would not waive the protection afforded to the confidential information and source by Exemption 7(D)." (*Lori Shem-Tov v. Department of Justice, et al.*, Civil Action No. 17-2452 (RDM), U.S. District Court for the District of Columbia, March 30)

Judge Colleen Kollar-Kotelly has ruled that GSA has finally shown that the majority of its **Exemption 5 (privileges)** claims in response to CREW's request for records concerning the Trump administration's involvement in holding up the FBI relocation project are appropriate, ruling in favor of CREW only to the extent that the agency had failed to show the exemption applied to one category of records and that, further, the agency had failed to show that it had conducted a **segregability analysis** pertaining to another category. In her earlier rulings in the case, Kollar-Kotelly had decided that the agency's *Vaughn* index was insufficient to justify its exemption claims and reviewed the records *in camera*. As a result of the *in camera* review, Kollar-

Kotelly accepted all but one of the agency's exemption claims. As to the record she found was not privileged, she noted that "an unredacted version of this same email was publicly disclosed by the House Oversight Committee. Review of the unredacted version of this email does not align with GSA's description in its *Vaughn* Index. The communication does not appear to include any 'recommendations' or 'consultations,' much less any 'deliberation' about the course of the project." She observed that the unredacted version "also notes that the president 'signed off' on the project, which suggests that the communication was not 'pre-decisional' as to any agency policy or decision about the project." As to three other categories, Kollar-Kotelly found the agency had justified its exemption claims. CREW argued that some draft records that had resulted in a congressional report had likely constituted the agency's final position. But Kollar-Kotelly pointed out that "the draft at issue here indicates that it is a preliminary analysis by GSA OIG that was created for the purpose of eliciting GSA's comments and responses. Other courts in this jurisdiction have concluded that similar draft reports containing, or eliciting comments are both deliberative and pre-decisional." Kollar-Kotelly ordered the agency to supplement its segregability claims pertaining to one category. She noted that "the Court has identified several examples of communications that do not appear to involve deliberation about any agency policy – for example, emails which simply reference a draft document attached, but do not otherwise contain deliberations about agency policy within the body of the email messages. GSA provides no justification for withholding such emails, which are plainly segregable from any attachment or other messages that may otherwise be covered by the deliberative process privilege." (*Citizens for Responsibility and Ethics in Washington v. General Services Administration*, Civil Action No. 18-2071 (CKK), U.S. District Court of the District of Columbia, March 29)

Judge Carl Nichols has ruled that the FBI has not shown that it **conducted an adequate search** for records in response to requests from Property of the People and its founder Ryan Shapiro for records relating to the documentary film "Cowspiracy," the term "ag-gag" and eight specific pieces of legislation. The agency searched its Central Records System but located no responsive records. Property of the People argued that the agency should have known that a keyword search would not yield any responsive records and instead should have conducted a more targeted search. Nichols agreed the search was insufficient under the circumstances. He noted that "defendants' argument that the FBI followed (or even went beyond) its standard FOIA search procedures and thus satisfied its FOIA search obligation misses the key question, which is not whether they can demonstrate that standard FOIA procedures were followed. Rather, the correct question is whether the search was reasonably calibrated to produce all relevant records." He pointed out that "because defendants have failed to provide any evidence that terms liked these were likely to be indexed, they have not demonstrated that the FBI conducted a sufficient search for records relating to 'Cowspiracy' or 'ag-gag.'" Nichols also rejected the FBI's argument that a more thorough search would be **unduly burdensome**. He observed that "here, Defendants have not produced any explanation, much less a detailed one, of the time and expense of the proposed searches. Instead, they rely solely on conclusory statements from their declarant, stating that full-text searches and searches of specific offices would be highly burdensome to the FBI. These statements, without more, are insufficient to relieve the FBI from its obligation to do more than search the CRS indices." He added that "the Court certainly cannot conclude, based on the record before it, that it would be unduly burdensome for the FBI to have to do more than it already has." (*Property of the People, et al. v. United States Department of Justice, et al.*, Civil Action No. 18-01202 (CJN), U.S. District Court for the District of Columbia, March 31)

A federal court in New York has ruled that most portions of the videos taken of the forced-feeding of Mohammad Salameh, who was convicted for his role in the 1993 terrorist attack against the World Trade Center, by the Bureau of Prisons are protected by **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement records), Exemption 7(E) (investigative methods or**

techniques), and **Exemption 7 (F) (harm to person)** in response to FOIA requests from investigative journalist Aviva Stahl, but that the agency has not shown that it conducted a **segregability analysis** to determine if non-exempt portions of the videos could be separated and disclosed. As a result of a hunger strike Salameh began in 2015, his health deteriorated enough to require two medical interventions to force-feed him. Both episodes required Salameh to be physically restrained and fed intravenously. Stahl requested Salameh's medical records as well as videotapes of any involuntary medical treatment. By the time Judge Brian Cogan of the Eastern District of New York ruled on her suit, the only issue remaining was disclosure of the videos. Cogan first addressed whether the records qualified as law enforcement records under the threshold standard for Exemption 7. He noted that "they relate to an integral part of the execution of sentences. . .Salameh's hunger strikes threatened BOP's ability to fulfill its obligations. The BOP responded with the 'involuntary medical treatment' and 'calculated use of force,' and it compiled the videos to document those actions and to guard against allegations of impropriety. Under a commonsense understanding, therefore, the videos were 'compiled for law enforcement purposes' within the meaning of Exemption 7." Cogan found Exemption 7(F) applied to portions of the videos. He noted that "the videos also show 'protective gear,' 'security equipment,' and how the staff used the equipment to restrain an inmate, remove him from a cell, and move him to another part of the prison. Disclosing this information would enable inmates to circumvent the procedures, threatening the BOP's ability to perform them safely." Cogan observed that 7(F) also protected the identities of the prison staff that appeared in the videos, noting that "releasing the names and titles of the staff in the video could reasonably be expected to expose them to retaliation or reprisals." Having found those portions of the video protected by Exemption 7(F), Cogan indicated that "the fact that *segments* of the videos fall within an exemption does not mean that the entirety does so as well." He explained that "there is another, reasonably segregable portion that Exemption 7(F) does not reach: the segment that shows medical staff conducting the physical examination, ordering that Salameh undergo involuntary medical treatment, and implementing that treatment." Rejecting the agency's objections that medial staff could be identified, Cogan indicated that "that conclusion does not change simply because segregating non-exempt information will require some video editing." He pointed out that "because editing is routine and inexpensive, an agency cannot credibly claim that it lacks access to this technology. And if acquiring this software would stand in the way of complying with FOIA, no video would ever be disclosed." Rejecting the agency's claim that exempt information was inextricably intertwined with non-exempt information, Cogan observed that "but defendants' conclusory assertions do not make that showing, so I cannot conclude that Exemption 7(F) covers the entirety of the videos. If defendants wish to withhold the remaining portion, they must look to another exemption." Although Cogan concluded that Exemption 7(C) applied, he pointed out that "at this point, however, defendants are no better off than under Exemption 7(F). Defendants have not explained why they cannot edit the video to obscure the identities of BOP staff, just as they could have redacted a written document. If defendants wish to withhold the remainder of the video, they once again must look elsewhere." Cogan also rejected the agency's Exemption 7(E) claims. He noted that "defendants have not explained, even at the most general level, what the BOP could have been 'investigating' or 'prosecuting' while recording the remaining portion. Nor have they explained why disclosure would compromise their ability to perform investigations or prosecutions." Cogan concluded by telling the agency that it needed to either supplement its affidavits to justify the exemption claims to the portions of the videos he had found were not exempt or the agency could provide the videos for *in camera* review. (*Aviva Stahl v. Department of Justice, et al.*, Civil Action No. 19-4142 (BMC), U.S. District Court for the Eastern District of New York March 26)

A federal court in Illinois has ruled that neither the Department of Health and Human Services nor U.S. Immigration and Customs Enforcement are obligated to disclose **text messages** in response to FOIA requests from Northwestern University Professor Jacqueline Stevens because they do not retain text messages. District Court Judge Mary Rowland also found that ICE was not obligated to disclose screenshots because to do so

would require the **creation of a record**. Stevens filed suit pertaining to 29 FOIA requests she had submitted to HHS, ICE, the U.S. Agency for Global Media, U.S. Citizenship and Immigration Services, U.S. Geological Survey, and U.S. Agency for International Development. She requested text messages from employees of both HHS and ICE. Both agencies argued that they "cannot produce responsive text messages because they either do not record them or are unable to search them." Accepting the agencies' assertions, Rowland noted that "FOIA litigation is thus an inappropriate vehicle for this issue." Stevens argued ICE was capable of providing the requested screenshots, arguing that they were another form or format of records required to be disclosed under FOIA. But Rowland noted that "common sense suggests otherwise. A screenshot is a representation of a program in action but lacks any of the functionality or utility with the program. It is not, then, comparable to producing the same document on either a CD-ROM or a flash drive." The government argued that because Stevens had indicated in an email exchange that she was not challenging the agencies' exemption claims at that time she had waived the right to challenge them later. Rowland disagreed, noting that "Stevens did not waive withholding issues. Rather, she stated that the Motion to Compel did not address them. As Stevens points out, it would have been difficult for the Motion to have addressed withholding issues at that time; because she lacked a *Vaughn* index, she did not have the information necessary to raise objections to specific withholding decisions." (*Jacqueline Stevens v. Broadcasting Board of Governors, et al.*, Civil Action No.18-5391, U.S. District Court for the Northern District of Illinois, March 30)

Judge Randolph Moss has ruled that the Executive Office for U.S. Attorneys failed to justify its processing of four of five requests submitted by Fulvio Flete-Garcia concerning the criminal cases brought against him in the U.S. District of Massachusetts. EOUSA closed his first request after concluding it was duplicative of a prior request. The agency also provided Flete-Garcia with an opportunity to appeal the decision. Flete-Garcia did not file an appeal. Three other requests asked for information concerning juries that indicted him and included the relevant indictment numbers. In response to Flete-Garcia's suit, the agency told Moss it had no record of receiving the three requests, even though Flete-Garcia provided return-receipts for each request. The fifth request also asked for records concerning the grand jury associated with a specific indictment number. The agency received that request and denied the request based on **Exemption 3 (other statutes)**, citing Rule 6(e) protecting grand jury secrecy. Moss found that because the agency had responded within the statutory time limits to the request it deemed duplicative, Flete-Garcia had **failed to exhaust his administrative remedies.** Turning to the three requests which EOUSA claimed it did not receive, Moss noted that "EOUSA offers very little information about what *did* happen – or, indeed, even about what *might* have happened – here." He indicated that "without additional information – and perhaps an evidentiary hearing – the Court cannot conclude that EOUSA has carried its summary judgment burden demonstrating that there is no material issue in dispute." Moss found that the grand jury commencement and termination dates were not protected by Rule 6(e). He pointed out that "records that disclose the commencement and termination dates for grand juries are protected from disclose, if at all, only when disclosure risks revealing the substantive work of the grand jury, including the identity of grand jury witnesses or the details of a specific grand jury investigation." (*Fulvio Flete-Garcia v. U.S. Department of Justice*, Civil Action No. 19-2382 (RDM), U.S. District Court for the District of Columbia, March 25)

A federal court in Washington has ruled that U.S. Immigration and Customs Enforcement failed to justify its claims under **Exemption 6 (invasion of privacy)** and **Exemption 7(C) (invasion of privacy concerning law enforcement records)** in response to a request from the Human Rights Defense Center and Michelle Dillion for records concerning litigation against the agency in which the government paid $1,000 or more. For traffic-related claims, HRDC limited its request to those in which the government paid more than $50,000. The agency initially asked HRDC to narrow the scope of its request by type of litigation and timeframe. After Dillon declined to narrow the scope of the request, ICE denied the request, claiming it was too broad. HRDC

filed suit and the agency agreed to process the request but redacted names, emails addresses, and phone numbers of ICE employees and other individuals contained in the records. District Court Judge Thomas Zilly concluded that the records were not protected by Exemption 6. He then turned to a discussion of whether the records qualified as law enforcement for purposes of Exemption 7. Finding that the settlement records qualified as law enforcement records, Zilly indicated that "the existence of the Settlement provides at least some evidence of wrongdoing on the part of the ICE employees named in the underlying case and Settlement" and observed that "there is a significant public interest in disclosing the identities of ICE employees, thereby allowing HRDC to assess whether the employees are repeat offenders, whether their conduct has resulted in other expenditures of public funds, or whether they are still employed by ICE." Zilly found Exemption 7(C) also did not apply. Zilly rejected HRDC's contention that ICE's failure to respond to its request in a timely manner was a clear violation of FOIA. Instead, Zilly pointed out that "any delay in issuing the decision was at least in part due to ICE's unsuccessful attempts to narrow the scope and timeline of HRDC's request." He explained that "the Court is unwilling to conclude that ICE's delays were unreasonable, let alone 'egregious.'" Zilly ruled in favor of HRDC on the matter of **attorney's fees**. He noted that "because Plaintiffs have 'substantially prevailed' in this matter by obtaining relief through this Order and ICE's change in position, the Court awards Plaintiffs their reasonable fees and costs." (*Human Rights Defense Center and Michelle Dillon v. U.S. Department of Homeland Security*, Civil Action No. 18-01141-TSZ, U.S. District Court for the Western District of Washington, Apr. 6)

Judge Amit Mehta has ruled that the Sierra Club is entitled to **attorney's fees** for its FOIA litigation against the EPA for records substantiating former EPA Administrator Andrew Wheeler's claim that the effects of climate change were still decades in the future. The agency argued that it was processing the Sierra Club's request before the organization filed suit and that the suit itself did not cause the agency to respond to the request. Mehta disagreed, noting that "EPA cites no case for the proposition that a newly revealed past intent to disclose records can defeat the element of causation." He pointed out that "after initially suggesting to Plaintiff that it would search for responsive records, EPA advised that the request was not 'reasonably specific' and refused to commit to disclosure, causing Plaintiff to take an administrative appeal. When EPA dragged its feet in issuing a decision on appeal, Plaintiff was left with no choice but to file suit. In such circumstances, it is 'more probable than not,' that filing suit caused EPA to reverse the only position it ever articulated to Plaintiff – that it would not produce records." Mehta also rejected the agency's claim that the Sierra Club materially changed its request during litigation. He noted that "plaintiff never modified the request itself; rather, after commencing litigation the parties reached agreement on a search protocol to identify responsive records. What's more, the approach the parties eventually took was one that Plaintiff had proposed since the outset of the administrative process. EPA never explains why during the administrative proceedings it refused to reach an agreement on search terms, and instead stood firm that the request was not 'reasonably specific.'" Mehta found the agency's resistance to conducting a search – particularly after it had agreed to a similar search the previous year in response to litigation filed by PEER – was not reasonable. He pointed out that "indeed, it is telling that immediately after filing suit, and with the benefit of counsel from the U.S. Attorney's Office, EPA agreed to run searches that it had long resisted. This is not the kind of agency response to a legitimate FOIA request that Congress had in mind, and it is precisely the type of response that Congress thought warranted an award of attorney's fees." Turning to the calculation of fees, Mehta noted that he would reduce the number of hours spent on *pro hac vice* matters, observing that "those hours are not compensable." He reduced the hours requested slightly, awarding $41,585.55 in fees and costs. (*Sierra Club v. United States Environmental Protection Agency*, Civil Action No. 19-03018 (APM), U.S. District Court for the District of Columbia, March 31)

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Judge Randolph Moss has resolved the remaining privilege disputes in litigation between Hall & Associates, an environmental consulting firm, and the EPA over records dealing with the agency non-acquiescence with ruling of the Eighth Circuit in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), in which the appeals court found that the EPA had exceeded its statutory authority in issuing a regulation on water-quality limitations for secondary treatment facilities. In resolving Hall's request, the agency withheld records under the deliberative process privilege and the attorney-client privilege. By the time Moss ruled, only 12 documents remained in dispute. Addressing a five-page email string containing the latest hot issues for the municipal and industrial national pollutant discharge elimination system section within EPA Region 4, Moss found the emails were both predecisional and deliberative. He noted that "although Hall may be correct that boilerplate invocations of the 'chilling effect' are insufficient at summary judgment, the EPA here identifies specific topics of discussion that would be hindered by the document's unredacted disclosure. Given the interstitial decision-making of the EPA that the document's disclosure would reveal, the Court concludes that there exists a real likelihood of such harm coming to pass." However, he indicated that the agency had so far failed to show that the document was not **segregable**. He pointed out that "the EPA has not explained how or why disclosure of the identified material 'would impose significant costs on the agency' or would demand the 'agency to commit to significant time and resources' to processing the records in a different manner. Neither has the agency explained why the withholdings covering purely factual material are inseparable from the deliberative portions of the document." (*Hall & Associates v. U.S. Environmental Protection Agency*, Civil Action No. 18-1749 (RDM), U.S. District Court for the District of Columbia, March 31)

Judge Carl Nichols has ruled that the DEA **conducted an adequate search** in response to Gerry Burnett's request for records concerning the agency's investigation and prosecution of him on drug charges. He requested a copy of the search warrant and information about the type of cell site simulator technology the agency used. In response, the agency disclosed four pages in full and 41 pages with redactions under **Exemption 6 (invasion of privacy)** and **Exemption 7 (law enforcement records)**. Burnett challenged the adequacy of the agency's search. Finding that the agency was not required to search for information referenced by Burnett in the form of a question, Nichols noted that "as for Burnett's contention that his request for information regarding surveillance was a proper request for records, not a question, the form of his submission is irrelevant. FOIA does not require federal agencies to provide information; it requires them to release records. Burnett's requests for 'methods of surveillance' and the 'method used to identify' him are requests for information, not records." Nichols agreed with the agency that **Exemption 7(F) (harm to person)** applied to the records. He pointed out that "here, the DEA explained that disclosing the names of individuals involved in drug investigations could result in 'harassment, reprisal, or physical retaliation' against those individuals – and notes that such dangers have been realized on several occasions." (*Gerry D. Burnett v. U.S. Drug Enforcement Administration*, Civil Action No. 19-00870 (CJN), U.S. District Court for the District of Columbia, March 31)

A federal court in Montana has ruled that the Western Organization of Resource Councils has **standing** to continue with its suit filed under the **Federal Records Act Committee** against the Department of Energy for violations of both the open meetings and open records provisions of the statute. WORC alleged that the National Coal Council did not provide any opportunity for the public to participate in the preparation of reports from its subcommittees. DOE argued that WORC had failed to state a claim for relief, but the court disagreed, noting that "Plaintiff alleges that the Council rubber-stamps *all* recommendations made by the subcommittees. . ." The court pointed out that "plaintiff has met its burden of establishing the facial plausibility of its FACA claims as it pertains to the Council's subcommittees by way of sufficient factual allegations in its Complaint. From the lack of documentation of any substantive discussion, revision, or amendment of the Council's reports in the Council's meeting minutes, Plaintiff draws a plausible inference

that the development of these reports occurs largely behind closed doors in meetings of Council subcommittees. Plaintiff suggests the Council attempts minimum FACA compliance by surfacing its reports for 'finalization' only after the Council's subcommittees have performed the substantive work of composing the reports in their entirety. The Court accepts as true at this stage of the proceedings Plaintiff's factual allegations and the reasonable inferences drawn from those allegations." (*Western Organization of Resource Councils v. David G. Huizenga*, Civil Action No. 20-98-GF-BMM, U.S. District Court for the District of Montana, Apr. 4)

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