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Washington Focus: A coalition of open government advocacy groups sent a letter April 7 to Attorney General Merrick Garland urging him to make changes in the way executive agencies continued to resist complying with FOIA. The letter explained that "we have observed a disturbing trend toward significantly less disclosure and increased obstacles that agencies impose on FOIA requesters in the administrative process." The coalition urged Garland to issue a memo setting a more positive tone towards compliance with FOIA. Some suggestions for such a memo included a presumption that agencies may not rely on discretionary exemptions to withhold requested information, an interpretation of "foreseeable harm" more in keeping with congressional intent, and a requirement that agencies may not assert Exemption 5 for documents more than 20 years old.

Court Interprets Recent SC Ruling on Exemption 5

Ruling in a case brought by Cause of Action Institute focusing on whether a uniform methodology for preparing pilot market assessments created by Pricewaterhouse Coopers (PWC), was protected by Exemption 5 (deliberative process privilege), Judge Beryl Howell has provided some context for applying the recent Supreme Court's ruling in *Fish and Wildlife Service v. Sierra Club*, 141 S. Ct 777 (2021), in which the Court found that biological opinions required to be prepared by FWS under the Endangered Species Act, were not final because the EPA, the agency for whose regulation the opinion was prepared, never actually considered it. While read in isolation, *Sierra Club* appears to add little to the debate on when decisions become final for purposes of the deliberative process privilege, Howell's decision makes clear that *Sierra Club* adds a missing part that makes it nearly impossible for requesters to challenge privilege claims where one decision bleeds into another deliberation and, as a result, almost nothing is ever final.

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Cause of Action Institute requested the records from the Department of Veterans Affairs after the agency announced plans for addressing the congressionally mandated Market Area Health System Organization analysis, part of a broader plan to improve the delivery of health care to veterans. Cause of Action Institute specifically requested records related to the results of the Pilot Study Contract, intended to provide a framework for conducting further pilot studies. After initially being referred to the VA Construction Facility and Management FOIA Office, the request was subsequently sent to the Veterans Health Administration for response. The agency identified seven documents responsive to the request, containing 489 pages, including three pilot market assessments and three attached documents prepared by PriceWaterhouseCoopers (PWC). The agency withheld all the records under Exemption 5, citing the deliberative process privilege. After Cause of Action Institute filed suit, the agency conducted a second review and decided that the eight-step methodology used in the three pilot market assessments could be disclosed. As a result, the agency released 38 pages, but withheld the remaining 451 pages.

Cause of Action Institute argued that the records were neither predecisional nor deliberative for purposes of the deliberative process privilege. Howell first characterized the documents, noting that "all seven records 'were used to inform VA's needs in conducting. . . market studies' in each of the ninety-six markets, which studies 'are current and ongoing' and will identify 'opportunities' for capital investments, divestments, or shifts in services provided' to inform VA's National Realignment Strategy." She pointed out that "the agency avers that 'the recommendations contained in the documents were not fully acted upon, finalized or operationalized.'" She agreed that the agency had adequately described why the documents qualified for the deliberative process privilege. She indicated that "the conclusions reached in the documents offer options for the presentation, development, and types of recommendations that the agency might choose to pursue in the course of the ninety-six market assessments and the formation of the National Realignment Strategy. PWC's suggestions on these topics remain under agency consideration."

Cause of Action Institute argued that "VA's deliberations about the methodology at the center of the pilot market assessments have ended and 'any supposed distinction between the pilot studies being "complete" but not "final" is mere sleight of hand.'" Cause of Action Institute pointed out that the methodology seemed completely detached from VA's broader efforts to design a national realignment strategy and that, regardless, the President had the ultimate authority under the relevant legislation. However, Howell noted that "the deadlines for VA to do so have not yet passed. Until they do, VA has substantial discretion to determine which inputs are relevant to its decisionmaking process and, crucially, to changes those inputs and its resulting views on the National Realignment Strategy."

With the *Sierra Club* decision in hand, Howell explained that the results of contracts "may themselves be 'complete,' insofar as VA has no immediate plans to revise them further, but that represents just one of the many steps that VA must take before the MAHSO analysis, and in turn, the National Realignment Strategy are 'final.' At any point during this process that precedes the submission of the agency's findings and recommendations, so long as it remains faithful to the final criteria that will be published in the Federal Register by May 31, 2021. . .VA is free to change its approach to the assessments without any consultation or review with outside actors." Howell noted that "moreover, VA explicitly declares that the pilot market assessments 'are not final as they pertain to' the evaluation of or recommendations concerning the three pilot markets because [they]. . .will evolve over the course of the MAHSO project. In the face of these clear disclaimers of finality, the record does not support a conclusion that VA 'treats' the pilot market assessments and briefing documents 'as its final view' on either the methodology for the market assessments as a whole or the documents of the three pilot markets in particular."

Howell rejected Cause of Action Institute's claim that allowing agencies to determine when drafts became final would encourage agencies to classify everything as in draft form. Howell noted that the Supreme

Court had rejected the same argument in *Sierra Club* as too speculative. Applying the claim to the circumstances here, Howell pointed out that "to the contrary, the record shows that VA continues to refine its methodology as the nationwide market assessments progress and will revisit its evaluation of the pilot markets as more information emerges."

She then rejected Cause of Action Institute's claim that the records were not deliberative because they did not make recommendations or reflect the give-and-take of the consultative process. Instead, she noted that "here, the pilot market assessments and briefing documents relate to VA's choice of methodology to carry out the market assessments, the type of improvement opportunities to pursue, and how to present its findings to the AIR Commission, Congress, and the public." (*Cause of Action Institute v. U.S. Department of Veterans Affairs*, Civil Action No. 20-997 (BAH), U.S. District Court for the District of Columbia, Apr. 20)

Views from the States

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

Michigan

An evenly divided supreme court has resulted in upholding the ruling of the court of appeals finding that the Bentley Historical Library at the University of Michigan must process a FOIA request received from Hassan Ahmad for access to the documents of anti-immigration activist John Tanton, who donated 25 boxes of personal papers to the library on condition that they would not be open until 25 years after his death. In response to Ahmad's request submitted before the 25-year mark had been reached, the Bentley Library contended they were not yet public records. The trial court ruled in favor of the library, but the court of appeals found that the 25-year condition did not prevent the Library from its FOIA obligations. The supreme court agreed to hear the case, but because three justices ruled that the order should be vacated, with three other justices dissenting and a fourth recusing himself, the end result was that the appeals court decision remained in place. Chief Justice Bridget Mary McCormack called the appeals court decision "bad logic." She observed that requiring processing of such donor records would mean that "if Michigan's public institutions can't honor donor agreements, some people may simply opt to donate to private or federal archives." Justice David Viviano, concurring, explicated the position of those justices voting to vacate the order. He noted that "rather than resort to the broad purposes behind FOIA to determine the definition of 'public record,' and resolve the case today, I would wait until we could assess whether the materials here, even if deemed public records, fall within FOIA's personal-privacy exemption." (*Hassan M. Ahmad v. University of Michigan*, No. 160012, Michigan Supreme Court, Apr. 9)

Oklahoma

The supreme court has ruled that the Norman City Council violated the Open Meeting Act when it substantially revised a budget item on its notice for items to be discussed during the meeting. Although adopting a budget was included on the posted notice of agenda, the city council instead amended the budget several times and wound up unexpectedly reallocating $865,000. The Fraternal Order of Police and several other interest groups filed suit, alleging the city council had violated the open meeting statute. The city argued that the agenda was not misleading. The trial court disagreed, noting that "however, any person who read the language used would have understood that there would be a defunding, a reallocation, or modification of any underlying departments' budget." The supreme court agreed as well. The supreme court noted that "the

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language used in the agenda was deceptively vague and likely to mislead regarding the meeting and was therefore a willful violation of the Act. Due to the City's failure to post a valid notice under the Open Meeting Act, City's amendment of the city budget and subsequent approval of the amended budget is invalid." (*Fraternal Oder of Police, et al. v. City of Norman*, No. 119,296, Oklahoma Supreme Court, Apr. 13)

The Federal Courts…

A federal court in Minnesota has ruled that while the Department of Justice did not show that Kyle Richard Greene **failed to exhaust his administrative remedies** for purposes of filing suit against the Executive Office for U.S. Attorneys after the agency did not respond to his request within the statutory time limit, the court found that the agency's subsequent search and disclosure of records was sufficient to show that it had **conducted an adequate search**. Greene submitted a 10-part FOIA request to the U.S. Attorney's Office for the District of Minnesota for records pertaining to the number of indictments and their further prosecution. After the agency failed to respond on time, Greene filed suit, alleging only that the agency had violated FOA's time limits. In response to the suit, the agency searched for responsive records to eight subparts in the USAO's Office in Minnesota and referred the other two subparts to EOUSA's Washington office. The agency then provided Greene a list responding to the ten subparts and filed a motion for summary judgment. The agency argued that Greene's suit was **moot** because it alleged only a violation of the time limits and once the agency had responded, there was no remaining cause of action. District Court Judge Eric Tostrud agreed in part, observing that "insofar as Greene's Complaint raised a 'timeliness' claim – that is, a challenge to the timing of DOJ's response, irrespective of the substance of the response – that claim is now moot because DOJ has provided a response." Tostrud then pointed out that "the Complaint is best understood to extend beyond the timing of DOJ's response to its substantive adequacy." He explained that "to be sure, the Complaint could not have alleged specific reasons why DOJ's response was inadequate because the response did not exist when Greene filed it." He indicated that "here, Greene made sufficiently clear that he intended to 'raise the issue of his ultimate entitlement to have access to the records'. In other words, a live controversy remains concerning the adequacy of DOJ's response, and DOJ's motion will accordingly be denied to the extent it seeks complete dismissal of the action on mootness grounds." DOJ next argued that in order to challenge the agency's response, Greene was required to first file an administrative appeal. Again, Tostrud disagreed. He noted that "§ 552(a)(6)(C) [the provision pertaining to filing a FOIA request] allows constructive exhaustion of all aspects of a plaintiff's FOIA claim, not just a challenge to the timeliness of the agency's response. This conclusion is more consistent with the text of the statue, which deems a person making a FOIA request 'to have exhausted his administrative remedies *with respect to such a request.* Nothing in this text limits its applicability to questions of timeliness or suggests that it loses effect once the agency provides a response. Indeed, the phrase 'with respect to such request' suggests just the opposite: that constructive exhaustion applies to the whole request." Applying the conclusion here, Tostrud explained that "DOJ acknowledged receipt of [Greene's] request. . .but it did not determine whether to comply or otherwise provide a response to the request within 30 days. This did not comply with FOIA's time limit provisions and Greene was accordingly 'deemed to have exhausted his administrative remedies with respect to [his] request' at the time he filed this law sit in May 2020. This remained true after DOJ provided a response in October 2020." Having removed the remaining obstacle to Greene's ability to challenge the adequacy of the search, Tostrud concluded that DOJ's response was nevertheless adequate. He observed that "in short, the only evidence in the record indicates that DOJ looked where the records might reasonably have been found, that no other responsive records exist, and that the agency has fully discharged its obligations to respond to Greene's request, even if it was late in doing so." (*Kyle Richard Greene v. U.S. Department of Justice, et al.*, Civil Action No. 20-1207 (ECT/LIB), U.S. District Court for the District of Minnesota, Apr. 9)

Judge Rudolph Contreras has ruled that the U.S. Marshals Service has not yet shown that it **conducted an adequate search** for records concerning stingray cellphone tracking surveillance that may have been used in the investigation of Mario Dion Woodward, who was convicted of murdering a police officer in Montgomery, Alabama. After the agency did not provide any records in response to Woodward's FOIA request, and denied his administrative appeal, Woodward filed suit. His suit prompted the agency to disclose 300 pages of responsive records with redactions under **Exemption 6 (invasion of privacy), Exemption 7(C) (invasion of privacy concerning law enforcement record), Exemption 7(E) (investigative methods or techniques)**, and **Exemption 7(F) (harm to person)**. Woodward argued that *ACLU v. Dept of Justice*, 655 F.3d 1 (D.C. Cir. 2011), in which the D.C. Circuit ruled that disclosure of records on the number of prosecutions based on warrantless surveillance was in the public interest, supported Woodward's public interest argument here. But Contreras pointed out that "here, the requested information would not shed 'light on the scope and effectiveness of cell phone tracking as a law enforcement tool.' Even derivative uses of the requested information – personally identifying information of individuals involved in Plaintiff's case – would not plausibly speak to substantive law enforcement policy in general, as the request in *ACLU* did. Instead, the requested information might uncover evidence that could be useful in the Plaintiff's other litigation but that would not implicate a cognizable public interest in the Exemption 7(C) analysis." But Contreras agreed with Woodward that the D.C. Circuit's ruling in *Roth v. Dept of Justice*, 642 F.3d 1161 (D.C. Cir. 2011), in which the D.C. Circuit recognized a heightened public interest in cases involving death row inmates, suggested further review. He explained that "the court appreciates the gravity of plaintiff's status as a death row inmate. To confirm for itself that the withheld information does not implicate the public interest in knowing whether the federal government engaged in unconstitutional conduct in plaintiff's case, the court will review *in camera* the withheld material." Contreras also found that while the agency had justified some of its 7(E) claims, it had failed to do so for others. He observed that "although the court has concluded that some of USMS's Exemption 7(E) justifications are appropriate, it cannot yet grant partial summary judgment in its favor given these circumstances. The court will await further justification from USMS on its Exemption 7(E) claims before ruling on segregability." (*Mario Dion Woodward v. United States Marshals Service*, Civil Action No. 18-1249 (RC), U.S. District Court for the District of Columbia, Apr. 20)

A split panel of the Ninth Circuit has ruled that journalist Keven Poulsen is eligible for **attorney's fees** because he substantially prevailed in his litigation with the government for access to records concerning surveillance of President Donald Trump and his advisors during the 2016 election. The agency originally issued a *Glomar* response neither confirming nor denying the existence of records. After Poulsen filed suit, Trump declassified a memo written by House Intelligence Committee chair Devin Nunes, confirming that Carter Page had been the subject of surveillance. After the Nunes memo was disclosed, ranking House Intelligence Member Adam Schiff published a memo disputing the assertions in the Nunes memo. Once both memos became public, the government provided Poulsen with 412 pages of records on its surveillance of Page that were now no longer classified. Poulsen then filed a motion for attorney's fees, arguing he was both eligible and entitled to fees. The district court ruled that Poulsen was not eligible because he "did not secure a change in the legal relationship between the parties nor did he prevail on the merits of his arguments." Because the district court ruled that Poulsen was not eligible for fees, it did not rule on the issue of whether he was entitled to fees. Poulsen argued that the district court's order requiring the government to disclose the declassified records constituted a judicial order for purposes of the attorney's fees provisions. The district court, however, found that Trump's declassification order caused the subsequent disclosure, not Poulsen's suit. Writing for the Ninth Circuit, Circuit Court Judge Kim Wardlaw disagreed, noting that "however, in light of

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the 2007 Amendments to FOIA, we think it clear that a complainant need not show a causal connection between the FOIA lawsuit and the government's change in position to establish that he has 'substantially prevailed' under 5 U.S.C. §552(a)(4)(E)(ii)(I)." She pointed out that "as written, nothing in the subsection's text suggests that we look behind the judicial order and ascertain how it came into existence. Rather, it requires only the entering of an order of the sort described in that subsection." Wardlaw rejected the agency's attempt to cast the order issued in Poulsen's suit as a mere scheduling order. Instead, she observed that "the March 27 Order 'affirmatively required the processing and production of documents by a date certain. We therefore reject the government's effort to recast it as a mere scheduling order through which Poulsen obtained nothing." She then noted that "our analysis does not render irrelevant issues related to how the judicial order came into existence. Indeed, whether the government's initial nondisclosure position was legally correct is a factor that the district court must weigh at the discretionary entitlement phase." Because the district court did not address the issue of Poulsen's entitlement to fees, the Ninth Circuit remanded the case to the district court for a determination of whether Poulsen was entitled to fees. (*Kevin Poulsen v. Department of Defense, et al.*, No. 19-16430, U.S. Court of Appeals for the Ninth Circuit, Apr. 16)

A federal court in California has ruled that the government may **sever** a FOIA suit brought by the American Small Business League against OMB and the Small Business Administration because the claims against each agency are sufficiently different to merit separating them. ASBL submitted a single request to OMB for records reflecting the federal acquisition budget for each year. OMB responded that there was no specific federal acquisition budget for each year and that it did not have any responsive records. ASBL submitted three separate FOIA requests to SBA for a variety of records, focusing on communications from Terry Sutherland, who directed the SBA press office. The other request asked for records pertaining to various members of the National Small Business Development Center Advisory Board. SBA denied ASBL's requests for a fee waiver for all three requests. ASBL filed suit against both agencies, alleging that OMB violated FOIA by not disclosing responsive records, while SBA violated FOIA by not granting ASBL fee waivers. The government asked the district court to sever the cases. Magistrate Judge Donna Ryu agreed. She noted that "here, ASBL does not allege the same or similar 'underlying course of conduct' with respect to its FOIA requests. Instead, it submitted different FOIA requests to different agencies, received different responses from each agency, and pursues different claims and remedies against each." She pointed out that "given that ASBL is suing two agencies for different types of claims regarding unrelated FOIA requests, there is no case management efficiency or other benefit to be gained from allowing the case to proceed under one caption. In fact, permitting joinder under such circumstances may result in overall delays." She indicated that "ASBL's claims against SBA are severed and shall proceed under a separate case with SBA as the sole defendant." (*American Small Business League v. United States Office of Management and Budget, et al.*, Civil Action No. 20-07126, U.S. District Court for the Northern District of California, Apr. 21)

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