Volume 48, Number 1
January 12, 2022

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: The Department of Agriculture has denied Michael Ravnitzky's FOIA request for congressional reports regarding how the Department planned to better manage its vehicle fleet by citing Section 718 of the Consolidated Appropriations Act of 2021 as an Exemption 3 statute. In its Jan. 13 denial letter, the agency indicated that "Section 718 of the statute prohibits the agency from releasing reports associated with the appropriation hearing process. For this reason, [the agency] would not be able to provide any records responsive to your request, even if such records were located in the agency's search.". . .The Supreme Court denied certiorari Jan. 10 for Rojas v. FAA, a recent 9th Circuit decision in which a split court adopted the consultant corollary doctrine..

Court Rules Consultant Corollary Applies to Records from Congress

A decision by Judge Colleen Kollar-Kotelly provides an interesting discussion of the tensions inherent in the disclosure of records that involve the intersection between Congressional and agency collaboration involving the agency decision-making process. Ruling in a case brought by American Oversight against the Department of Transportation for records concerning communications between Sen. Mitch McConnell (R-KY) and DOT, which was run by McConnell's wife, Elaine Chao, American Oversight argued strenuously that records requested by Congressional staff *from* an agency were not protected under Exemption 5 (privileges) because they failed to meet the inter- or intra-records threshold requirement. Concerned that American Oversight "might mean to suggest that inquiries from Congress to agencies are not 'agency records' within the meaning of FOIA at all, the Court directed the parties to submit supplemental briefing on the subject."

Kollar-Kotelly considered and rejected American Oversight's claim that congressional records were not protected under FOIA because Congress was not subject to FOIA. Instead, she pointed out that "if communications with

Congress are not 'agency' records within the meaning of Exemption 5, then they are not records within the meaning of FOIA. In other words, they are not subject to disclosure at *all*. In that regard, Plaintiff's reading would risk creating a fundamental conflict within FOIA." However, Kollar-Kotelly explained that American Oversight had conceded that DOT had relied upon records received from Congress as part of its own decision-making process. Citing *Rockwell International Corp. v. Dept of Justice*, 235 F.3d 598 (D.C. Cir. 2001), she pointed out that "communications between an agency and Congress fall squarely within Exemption 5 so long as they are otherwise privileged." She indicated that "for these interbranch communications to be intra- or inter-agency, however, the 'records exchanged' must either have been (1) solicited by the agency, or otherwise received where there is 'some indicia of a consultant relationship between' the interbranch staffs, and (2) the records must have been 'created for the purpose of aiding the agency's deliberative process.'"

Kollar-Kotelly explained that the Supreme Court's decision in *Dept of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001), in which the Court held that the deliberative process privilege did not protect discussions involving third parties whose interests were adverse to those of the agency, did nothing to settle when the consultant corollary applied to protect third-party records. She noted that *Klamath* questioned the continued viability of two D.C. Circuit opinions – *Ryan v. Dept of Justice*, 617 F.2d. 781 (D.C. Cir. 1980), which held that congressional input on procedures for selecting and recommending judicial nominees was protected, and *Public Citizen v. Dept of Justice*, 111 F.3d 168 (D.C. Cir. 1997), which held that the input of former Presidents on their records at the National Archives was protected even though it could be seen as adversarial. Kollar-Kotelly pointed out that "the Court of Appeals for the District of Columbia continues to apply the consultant corollary doctrine, but the degree to which the Court of Appeals has narrowed the doctrine in response to *Klamath* is uncertain." She indicated that American Oversight's strongest argument was that "Congressional staff represented their 'Senator's own interests and agenda, and the institutional interests of the legislative branch' as opposed to common interests shared by the respective staffs. If the Court of Appeals now requires that a non-agency interlocutor bring *no* divergent interest to bear, then those facts would strip the instant communications of Exemption 5 protection."

Kollar-Kotelly pointed out that two recent district court decisions involving American Oversight had come to opposite conclusions concerning the continued viability of the consultant corollary doctrine. One decision—*American Oversight v. Dept of Health and Human Services*, 380 F. Supp. 3d 45 (D.D.C. 2019) – held that "it appears that the law of this Circuit does require that outside consultants 'lack an independent interest' and added that the *Vaughn* index in the case "established that the Congressional interlocutors did not 'lack' an independent interest." By contrast, the district court judge in *American Oversight v. Dept Treasury*, 474 F. Supp. 3d 251 (D.D.C. 2020), reached the opposite conclusion, noting that "this Circuit's law [does not] require a non-agency interlocutor to have *no* interest distinct from that of the agency."

Kollar-Kotelly agreed with the district court judge in the *American Oversight v. Dept of Treasury* decision. She observed that "when discussing draft legislation, members of the two political branches may share the exact same goals and desire to further the exact same piece of legislation." She indicated that "the relevant inquiry should be, whether the two staffs were 'working together' to achieve a common legislative purpose. The record shows, and Plaintiff concedes, that the two staffs were 'working together.' Staffers for Sen. McConnell were considering several pieces of draft legislation and sought DOT staff's assistance in drafting and reviewing that legislation."

Nevertheless, Kollar-Kotelly indicated sympathy with American Oversight's concern about how Congress could qualify as consultants to agencies. Calling it "a kind of legal fiction," she noted that "Congressional staff are employed for a separate co-equal branch of government. Characterizing staffers, and even members of Congress, may seem to stretch the consultant corollary doctrine beyond its bounds, but application of the consultant corollary to Congress furthers FOIA's interests even more than its application to

private organizations. Even more than private, temporary hires, interbranch staffers 'will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news.'" She observed that "although the doctrine may nominally be called a 'consultant corollary,' communications between Congressional staff and agency staff on draft legislation where they are working towards legislative priorities are still 'agency' documents for the purpose of Exemption 5." (*American Oversight v. United States Department of Transportation*, Civil Action No. 18-1272 (CKK), U.S. District Court for the District of Columbia, Jan. 11)

Views from the States…

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

Indiana

The supreme court has ruled that the Hamilton Southeastern Schools (HSE) properly withheld the underlying documents explaining why it disciplined teacher and head football coach Rick Wimmer for a September 2016 incident involving his interaction with a student, but that HSE did not provide sufficient information for why it had a factual basis for Wimmer's discipline. After the incident, Wimmer was placed on paid leave, which was converted to unpaid leave the next month. WTHR-TV requested disclosable records from Wimmer's personnel file, which required disclosure of basic employee identifying information, information about formal charges, and the "factual basis" for certain types of discipline. WHTR-TV was told that Wimmer was disciplined for violating the School Board's policy entitled "Staff Conduct," which required staff to "demonstrate behaviors which contribute towards an appropriate school atmosphere." Dissatisfied, WHTR-TV filed suit. Both the trial court and the appeals court ruled in favor of HSE. WHTR-TV then appealed to the supreme court. There, the supreme court agreed that the exceptions to the personnel files exemption did not require disclosure of underlying documents, but only an adequate explanation of the disciplinary action. The supreme court observed that "it is the General Assembly's job to consider the benefits of transparency, authenticity, and accuracy arising from an agency turning over preexisting documents and act (or not). As things currently stand, the legislature has only required agencies to turn over public records that contain certain types of personnel file information. It has not required them to turn over underlying documents in personnel files. And this Court cannot 'amend' the Act to impose such a requirement, because only the General Assembly can make the law." However, the supreme court concluded that HSE had not provided a sufficient factual basis for why it disciplined Wimmer. Ordering HSE to provide a better explanation, the supreme court pointed out that "here, it is unclear which requirement Wimmer violated, let alone what he did to warrant discipline. No reasonable person could read HSE's statement and policy and understand why HSE disciplined Wimmer." (*WHTR-TV v. Hamilton Southeastern Schools*, No. 21S-MI-345, Indiana Supreme Court, Jan. 13)

Iowa

The supreme court has ruled in its first interpretation of the 2012 Iowa Public Information Board Act that a complainant has exhausted administrative remedies once a complaint is filed with the Board alleging that a public agency violated the Public Information Act. The case involved the January 2015 accidental shooting of Autumn Steele by Burlington Police Officer Jesse Hill, who was responding to a 911 call from Gabriel Steele, reporting a domestic assault by his wife Autumn. When Hill arrived at the Steeles' house, Gabriel was leaving with a child in his arm. Autumn was following close behind, hitting Gabriel. When

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Officer Hill tried to separate the two, the Steele's German shepherd growled at him and bit him on the leg. Hill fired his sidearm attempting to shoot the dog but accidentally shot Autumn instead. Autumn died of her injuries. The Des Moines County attorney declined to bring criminal charges against Hill. The Steele family then hired attorney Adam Klein to represent them in a civil suit in federal court. That case was settled in 2018 for $2 million in damages. In February 2015, the Des Moines County Attorney released a seven-page letter describing her decision not to charge Hill. Klein sent a public records request to the Iowa Division of Criminal Investigation (DCI), the Burlington Police Department, and the Des Moines County Attorney for records related to the investigation. In response, the DCI released the county attorney's letter, press releases, and a link to the Hill's bodycam footage. The BPD also disclosed the county attorney's letter and personnel information about another about another dog encounter involving Hill that had been referenced in the county attorney's letter. It did not release other personnel records, citing the investigative records exemption. Klein, joined by the Burlington Hawk Eye newspaper, filed a complaint with the Public Information Board, asking it to order the agencies to disclose the records because they were not protected. Although the Board, responding to a request from the agencies initially agreed that the complaint should be dismissed, because the federal court's 2018 settlement of the Steele family's suit ordered that all remaining records be disclosed, the Board accepted that result. As a result, the Board ruled that the agencies had acted properly by disclosing all the relevant records. Although Klein had initiated the case by filing a complaint, he did not intervene in the administrative proceedings. Instead, he filed suit, challenging the Board's final decision. The Board argued that Klein did not have standing because he had failed to exhaust his administrative remedies. The district court found that Klein did not have standing because he had not intervened at the administrative level and could only challenge the decision to withhold the dashcam footage, which had not been addressed as part of the administrative proceedings. The supreme court found that Klein had exhausted his administrative remedies, noting that "Board complainants exhaust administrative remedies by filing their complaint with the Board and receiving an adverse final decision on that complaint. Klein is a person who has exhausted his administrative remedies. Klein can petition for review of the Board's contested case decision despite not having intervened in the proceedings below." However, the supreme court indicated that Klein could not relitigate the Board's acceptance that all records that had been made public were appropriately disclosed. (*Adam Klein v. Iowa Public Information Board*, No. 0-0657, Iowa Supreme Court, Dec. 30, 2021)

The Federal Courts…

Judge Amit Mehta has ruled that the Environmental Defense Fund is both eligible and entitled to **attorney's fees** for its litigation against the EPA for records concerning the appointment of Scott Pruitt to head the agency at the beginning of the Trump administration. Because of a deluge of FOIA requests prompted by Pruitt's appointment, the agency failed to respond to EDF's request within the statutory time limits. Mehta imposed a 750-page-per-month processing requirement on the agency. A year later, the agency told Mehta it had finished processing EDF's request. However, the parties agreed to halt summary judgment after discovering that the EPA had inadvertently produced incomplete records. Another year went by, and the parties told Mehta they had resolved their differences through mediation except for the issue of attorney's fees. EDF then filed its motion for attorney's fees, which the EPA opposed. Mehta first turned to whether or not EDF was eligible for fees. He found that EDF had benefited from his judicial order. He pointed out that "the parties disputed what rate of processing of responsive documents should be, and ultimately, the court granted EDF greater relief than what the agency voluntarily offered: EPA suggested a 500-document-per-month processing rate, and the court ultimately ordered it to process 750 records per month and made production on a rolling basis. EDF thus received some of the relief it asked for." He observed that "because of the court's order, the completion of production –although admittedly not mandated by a date certain – accelerated, and the agency was obligated to work at a court-designated rate." Mehta also found that EDF succeeded under the

catalyst theory as well – that the litigation had caused the agency to move more quickly in processing EDF's request. The EPA argued that it had exercised due diligence in responding to EDF's request. But Mehta indicated that "the record reflects no genuine production of responsive documents prior to the initiation of the litigation. If EPA's pre-lawsuit communications to EDF here qualified as 'due diligence' for purposes of the catalyst inquiry, then an agency could always avoid paying fees by providing occasional non-substantive updates without ever rendering a determination on a FOIA request, offering any indication whether it will process the request, or generating any responsive records." He noted that "it was only after the litigation commenced that EPA finally indicated it would process and produce responsive records. That is a change in position by the agency, and it was catalyzed by the commencement of this lawsuit." Turning to the issue of whether EDF was entitled to fees, Mehta observed that the EPA argued that its processing of the request was reasonable for purposes of the four-factor test, which included the public interest in disclosure, the requester's commercial or personal interest in the request, and the reasonableness of the agency's response. Mehta noted that "in determining whether EDF is entitled to fees, the court must weigh all four factors. Thus, even if the government's position had some degree of reasonableness given the strength of the other three factors of a fee award, EDF would prevail. EDF is entitled to fees." However, Mehta rejected EDF's claim that the LSI Matrix – a method of calculating fees that is more generous than the USAO Matrix – did not apply and adopted the USAO Matrix instead, resulting in a significant fee reduction overall. Mehta also agreed with the EPA, the number of hours claimed by EDF were excessive and reduced them by 15 percent, resulting in a final fee award of $110, 955.92. (*Environmental Defense Fund v. United States Environmental Protection Agency*, Civil Action No. 17-02220 (APM), U.S. District Court for the District of Columbia, Jan. 13)

A federal court in Massachusetts has ruled that a coalition of individual attorneys, small law firms, and non-profit legal services organizations that represent non-citizens in immigration matters, like bond hearings, removal proceedings, and applications for affirmative asylum and other benefits **has a cause of action** under the Administrative Procedure Act to assert a **pattern and practice claim** against the Department of Homeland Security for failing to respond to FOIA requests in a timely manner. While components of the Department of Homeland Security routinely use information from Alien files maintained by U.S. Citizenship and Immigration Services in challenging immigrants' eligibility for benefits or services, those records are not disclosed to the immigrants themselves or their attorneys except in response to a FOIA request, which typically takes more than a year to receive a response, often after the expiration of legal deadlines for responding to immigration status challenges. To force DHS to remedy the inability to obtain necessary records under FOIA in time to be of use in representing immigrants facing removal proceedings, the coalition filed suit in January 2021, arguing that DHS was violating two provisions of the Immigration and Nationality Act that established the right of counsel for immigrants. The coalition argued that the agency's failure to provide access to relevant records in a timely manner undercut their ability to represent their clients. The court agreed that the claim fell within the zone of interest required to establish an APA claim but indicated that the coalition did not qualify to assert the due process claims of their clients. The court also found that the coalition did not have an adequate alternative remedy, noting that "these remedies are not adequate as Plaintiffs have alleged that the Policy forces them to endure significant delays and expenses filing unnecessary FOIA requests for documents the Agencies were legally obligated to disclose, resulting in responses that arrive after critical deadlines (e.g., after a final removal order) and are incomplete or redacted." As to the policy and practice claim, the court noted that "for agencywide policies, like the alleged policy here, courts look to whether the complaint refers to an identifiable agency order, regulation, policy or plan of Defendants, 'which constitutes or reflects an agency policy applicable to all agency officials.'" The court indicated that the coalition had only shown a connection to the effect of the FOIA policy on their ability to represent clients during asylum proceedings. The court pointed out that "by identifying DHS regulations that direct asylum applicants to file FOIA requests instead of seeking discovery for relevant documents to which the regulations

purportedly require access, Plaintiffs have plausibly alleged an agencywide policy with respect to these proceedings." As such, he allowed the suit to continue as it related to asylum proceedings. (*Greater Boston Legal Services, et al. v. United States Department of Homeland Security*, Civil Action No. 21-10083-DJC, U.S. District Court for the District of Massachusetts, Jan. 14)

Judge Amit Mehta has ruled that Executive Office of U.S. Attorneys properly withheld records under **Exemption 3 (other statutes)** in response to prison litigator Osvaldo Rivera Rodriguez's FOIA request for records concerning the grand jury proceedings that indicted him in the Southern District of New York. In response to Rodriguez's request, the agency located 82 responsive pages but withheld them entirely under Rule 6(e) on grand jury secrecy. In his first ruling in the case, Mehta found the agency had failed to show that it had **conducted an adequate search**. This time around, Mehta found the agency had provided an adequate explanation of its search and the reasons for withholding the records entirely. He began his discussion by noting that the agency had divided the records into three broad categories – Grand Jury Records, Grand Jury Transcript, and Grand Jury Preliminary Matters. He explained that "the updated Index provides greater specificity" and then noted that "Defendant has properly withheld all three categories of records. The grand jury minutes are exempt from disclosure under FOIA because these materials, as *Senate of the Commonwealth of Puerto Rico* stated, 'would tend to reveal some secret aspect of the grand jury's investigation, such. . .as the identities or addresses of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.' Grand jury voting records are similarly exempt because they are 'secret aspects of the grand jury's investigation' rather than nonexempt 'information coincidentally before the grand jury.' And, under a similar rationale, courts in this District have consistently held that Exemption 3 permits withholding of grand jury instructions." Rodriquez argued that he was entitled to the grand jury materials because he was a defendant. But Mehta observed that "FOIA does not entitle him to grand jury material because he is a criminal defendant. Defendant properly invoked Exemption 3." Although Rodriquez did not seem to contest the agency's decision to withhold the names of forepersons, Mehta pointed out that they were properly exempted. He noted that "the law in this Circuit is well settled that the names of grand jury forepersons are properly withheld under Exemptions 3, 6 (invasion of privacy) and 7(C) (invasion of privacy concerning law enforcement records)." He agreed that the agency had also conducted a sufficient **segregability analysis**. He noted that "Exemption 3 is unique insofar as 'its applicability depends less on the detailed factual content of the specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.' In analyzing the segregability of material withheld under Exemption 3, courts have noted that agencies must not compromise 'the secret nature of potentially exempt information.' Those concerns are present here. Defendant has shown that the requested records are properly exempt under Exemption 3 and further states that it is not possible to segregate the records 'due to the nature and content of the protected information.'" (*Osvaldo Rivera Rodriquez v. United States of Justice, Executive Office of the United States Attorney*, Civil Action No. 19-02510 (APM), U.S. District Court for the District of Columbia, Jan. 14)

Judge Randolph Moss has ruled that Carol Scarlett may not amend her FOIA request to the National Science Foundation to include the agency's Inspector General because she failed to show any reason why she had not included the IG in her original complaint and that if she now thought the IG had records relevant to her original request, she could file a separate FOIA request to the IG for such records. Scarlett owned a small business that had contracted to do work with the NSF. However, when she applied for the second phase of work, her application was denied. Scarlett filed a FOIA request to find out the reasons for the denial. She specifically asked for a complaint she discovered had been lodged against her with OIG alleging unknown wrongdoing on her part. OIG refused to provide any information except for the date of the complaint. After filing an unsuccessful administrative appeal, Scarlett filed suit against the OIG at NSF. Scarlett sought leave

to amend her complaint to add a claim of breach of contract, which the agency opposed. Moss agreed that Scarlett should not be allowed to amend her complaint. He noted that "this is because the new claims that Plaintiff seeks to add to this action, which has been pending for almost nine months, 'bear no more than a tangential relationship to the original action,' and would substantially 'alter the scope and nature of the litigation.'" He pointed out that "plaintiff's original complaint alleges that OIG violated its obligations under FOIA by failing adequately to respond to her FOIA request for the complaint filed against her." He indicated that "the proposed amended complaint, in contrast, includes allegations that have nothing to do with the adequacy of OIG's search or the propriety of its withholdings. Instead, Plaintiff now seeks to add allegations that NSF 'made reckless and false claims against her business financial practices,' and that NSF officials violated their own policies as part of the grant review process." Noting that this changed the nature of the litigation, he observed that "indeed, Plaintiff's proposed amendments would invite discovery in a case otherwise subject to resolution without discovery." He pointed out that "there is no reason, moreover, why FOIA plaintiffs who receive records that, in their review, support unrelated claims cannot simply bring a new lawsuit asserting those claims. Neither efficiency nor fairness counsels in favor of combing FOIA litigation with litigation of unrelated claims, even if records released pursuant to the FOIA request *might* support those claims." (*Carol Scarlett v. Office of Inspector General*, Civil Action No. 21-819 (RDM), U.S. District Court for the District of Columbia, Jan. 10)

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