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Washington Focus: President Joe Biden has ordered the National Archives to turn over White House visitors logs to the House select committee investigating the attack on the Capitol on January 6, 2021. While former President Donald Trump asserted that the records were privileged, Biden decided to overrule that assertion, indicating in a letter from White House Counsel Dana Remus to Archivist David S. Ferriero that "the President has determined that an assertion of executive privilege is not in the best interests of the United States, and therefore is not justified as to these records and portions of records." In her letter, Remus noted that "the records in question are entries in visitor logs showing appointment information for individuals who were processed to enter the White House complex, including on January 6, 2021."

Court Approves Agency Search But Finds Exemption Claims Inadequate

Dealing with a generation of FOIA litigation that started in 1979, Judge Rudoph Contreras has faulted the IRS for its apparent inability to appropriately respond to Pauline Stonehill's FOIA request for records concerning the investigation of her husband Henry's business dealings in the Philippines.

Henry Stonehill was a successful businessman in the Philippines, owning 16 corporations, including U.S. Tobacco, in the mid-1900s. The U.S. government began to investigate Stonehill and his business operations in the early 1950s, and eventually in 1962 the Philippine National Bureau of Investigation conducted a massive raid on his businesses in the Philippines, the fruits of which were shared with the U.S. government and eventually resulted in a multi-million-dollar tax judgment.

Stonehill's first FOIA request in 1979 was directed to the Department of Justice Criminal Division and referred to the Tax Division. In 1985, the Tax Division disclosed 1,145 documents, partially withholding 151 documents, and fully withholding 103 documents. Stonehill continued to submit FOIA requests in subsequent years, including a 2000 request asking for records on Stonehill and U.S. Tobacco Company from January 1952 through December 1976. Stonehill settled

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the litigation resulting from his 2000 request by agreeing not to file any more FOIA requests for a period of seven years. In return, the Tax Division agreed to release all documents related to *United States v. Stonehill*, review the remaining 254 documents, and provide a *Vaughn* index for records it continued to withhold.

Stonehill died in 2002. Pauline Stonehill eventually obtained documents shedding new light on the government's actions leading up to the 1962 raid. Although the Ninth Circuit rejected her fraud-on-the-court argument, it acknowledged government misconduct before and after the raid, including that the government's attorney, John McCarthy, had not been forthright in his representations to the court.

In 2014 and 2015, a member of the news media named Bethany McLean submitted a series of requests relating to Stonehill. While McLean's requests were referenced in three subsequent requests from Pauline Stonehill, the Tax Division responded to McLean's requests but not to Stonehill's requests. The Tax Division concluded that two of Stonehill's requests were duplicative of requests submitted by Stonehill and after confirming with Stonehill's counsel that he did not need any records already released to McLean, the agency decided not to reprocess the requests. However, the Tax Division reprocessed #10886, a non-duplicative request from McLean and located two responsive records. The Tax Division also conducted another supplemental search of a different database and identified nearly 8,000 responsive records.

The Tax Division argued that Stonehill's broadest FOIA request – which asked for records on Henry Stonehill – was covered by the doctrine of res judicata, which prohibits the same parties from re-litigating the same issues. The Tax Division contended that the settlement of Stonehill's 2000 request – asking for records on Stonehill and U.S. Tobacco – involved the same parties and issues. Contreras disagreed, noting that the passage of time likely meant that there were more potentially responsive records that did not exist at the time of the 2000 settlement. He pointed out that 'given those nuances and the material disagreement between the parties about the 2000 settlement agreement even precluded, the Court determines that summary judgment is not appropriate for Request #11240. *Res judicata* is an affirmative defense and the Tax Division has not met its burden of showing it applies."

After finding that res judicata did not apply to the requests, Contreras turned to the issue of whether the agency's search was adequate. He pointed out that the agency had admitted only recently that Stonehill's request contained two separate parts. He indicated that "here, the problem is not that the search in response to Request #11238 was unreasonable, but rather that it was not conducted at all. But the remedy is the same: Ms. Stonehill is entitled to have the agency conduct a search." He explained that "whether the Tax Division's failure to read an entire paragraph of the request was a careless or willful mistake is immaterial – either is unacceptable. And because the Tax Division indicated in its brief on July14, 2021 that it would commence searching for these documents immediately, the Court assumes that it has already made significant headway in processing this request since then."

Contreras noted that to assess the adequacy of the agency's current search, he had to also assess the adequacy of the original older search that they agency had relied upon as well. He pointed out that "while relying on a prior, broader request to facilitate the search for a narrower request may be a perfectly reasonable method in theory, it necessarily requires that the prior search also have been adequate – and there is considerable doubt as to whether that was the case. McLean's request resulted in a full or partial release of 12 pages. Since this litigation has commenced, the Tax Division has conducted additional searches beyond the administrative file of McLean's request for documents responsive to Request #11239 that resulted in significantly more documents being located." Those new searches included a database that yielded 721 items of records and although about half of them were duplicates, they added an additional 7,982 page of responsive records. Contreras concluded that the two searches combined resulted in an overall search that was adequate. He indicated that "with the benefit of hindsight, the Tax Division's errors – such as failing to follow up on the

2016 email from the Comptroller's Office and forgetting to search an apparently powerful and well-suited database that eventually turned up several thousand additional pages – are troubling. Such mistakes should have been rectified long before the agency was hauled into court and asked to prepare an affidavit of its efforts."

Contreras found that some records were protected by the attorney-work product privilege but that the agency had not shown that its deliberative process privilege claims were sufficiently supported. He rejected Stonehill's claim that the government misconduct exception applied to waive privileges generally. He pointed out that "while the Tax Division's processing of this request has hardly been a model of bureaucratic efficiency, Ms. Stonehill's speculation about the agency's nefarious motivations for its delays and mistakes are both unconvincing and insufficient to implicate the Tax Division itself of any wrongdoing by McCarthy even if it did occur."

Contreras ordered the Tax Division to provide a more thorough *Vaughn* index to support its exemption claims. The agency urged Contreras to adopt of a random sampling since the number of records was voluminous. Contreras rejected the invitation to order a sampling. He noted that "the voluminous nature of the pages to be indexed is proper consideration, but there is no magic number or sampling ratio that automatically makes a sample appropriate; rather, the determination must always be made with reference to the particular facts of the case." He observed that "here, a sampling index would be insufficient to establish the correctness of the Tax Division's asserted exemptions. As Ms. Stonehill points out, while the number of *pages* is relatively large, the number of *documents* is much more manageable. There are only approximately 360 discrete documents, but the high page count is driven by the fact that several (such as the draft legal brief) are presumably each many pages long. Not only does the lower number of documents with many pages make a complete *Vaughn* Index more feasible, it also means that any random page selected for a sample is less likely to contain enough context to meaningfully evaluate the whole." (*Pauline Dale Stonehill v. U.S. Department of Justice, Tax Division*, Civil Action No. 19-03770, U.S. District Court for the District of Columbia, Feb. 10)

Views from the States…

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

Connecticut

A trial court has ruled that Ian Cooke, a state prisoner, may not have access to admittedly public records he requested from the Department of Corrections unless he pays for copies that can be sent to his prison address. Cooke requested the records and asked to inspect them personally rather than to pay for copies. Because the agency's office for purposes of public inspection was in Wethersfield, Cooke was not allowed to travel there from the prison in which he was incarcerated. As a result, Cooke filed suit, arguing that he had a statutory right to inspect records. The court, rejecting Cooke's claim, indicated that "since each agency is required to keep *all* public records at its regular office or place of business in an accessible place, and the public must inspect during regular office or business hours, it follows that the public's inspection right is a right to inspect records at the agency's regular office or place of business." The court observed that "the foregoing interpretation of the statute is consistent with the text of the statute itself. . .," adding that "any obligation to transfer records at a member of the public's request would interfere with the ability of other members of the pubic to inspect the same records, and with the ability of the agency to safeguard and maintain such records." The court pointed out that "the fact that the plaintiff's ongoing incarceration prevented him

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from inspecting his requested records at the DOC's regular office does not support the conclusion that DOC had any obligation other than to offer inspection at [the Wetherfield] location or to provide copies." (*Ian Cooke v. Freedom of Information Commission, et al.*, No. HHB-CV-19-5026783, Connecticut Superior Court, Judicial District of New Britain, Feb. 23)

Georgia

A court of appeals has ruled that Matthew Cardinale may seek civil penalties for violation of the Open Records Act. Noting that the Georgia Supreme Court had recently found a civil remedy under the Open Meetings Act, the appeals court indicated that "considering that both the Open Records Act and the Open Meetings Act have the broad purpose to encourage public disclosure of governmental activity, we are compelled to conclude that this minor textual difference between the statutes is a distinction without any meaningful difference." (*Matthew Cardinale v. Tim Keane*, No. A21A1718, Georgia Court of Appeals, Feb. 15)

Kansas

A court of appeals has ruled that Kelly Roe, a trustee of the Phillips County Hospital for two years until she resigned, is not entitled to records in electronic format and that the hospital properly responded to her open records requests by agreeing to provide her responsive records in hard copy. Although Roe asked for records in electronic form, the hospital indicated they would provide them only in hard copy. Roe then filed suit, arguing that the Kansas Open Records Act implicitly required agencies to provide records in the format requested. The trial court sided with Roe and the hospital appealed. The court of appeals, however, reversed noting that while the federal Freedom of Information Act and several state open records laws provided requesters with the right to receive records in the format requested, the Kansas statute had no such provision. Rejecting Roe's claim, the appeals court indicated that "because KORA does not require a public agency to produce electronic records in the format of the requester's choice – such as a native-based electronic format – if the agency has the capability of producing the record in that requested format. Accordingly, the judgment is reversed, and the case is remanded for further proceedings with directions." (*Kelly Roe v. Phillips County Hospital*, No. 122,810, Kansas Court of Appeals, Feb. 11)

Kentucky

A court of appeals has ruled that the trial court properly dismissed a suit brought by the *Courier-Journal* for an attorney's fees award from the Louisville Metro Police as a result of its request for records concerning an internal investigation of sexual abuse allegations against officers involved in its Explorer Program. In response to the *Courier-Journal*'s request, LMPD told the paper that it no longer had any records because they had been transferred to the servers of the FBI, which was conducting an investigation through a joint LMPD/FBI joint task force, pursuant to a memorandum of understanding. The *Courier-Journal* then filed a complaint with the Attorney General. The Attorney General concluded that LMPD had initially acted improperly by failing to cite to the memorandum of understanding, although it rectified the error on appeal. LMPD appealed the Attorney General's opinion to the trial court, asking the court to dismiss the case. The *Courier-Journal* requested the court retain jurisdiction to oversee compliance with the Attorney General's opinion. The paper also asked for attorney's fees. The trial court dismissed the case, and the *Courier-Journal* filed an appeal. The appeals court found the trail court's dismissal was appropriate. The appellate court noted that "because the Courier-Journal can seek supervision of Louisville Metro's compliance with the OAG's opinion through its separately filed enforcement action, it has suffered no substantial injustice or prejudice from dismissal of the action herein." Turning to the *Courier-Journal*'s request for attorney's fees, the appeals court observed that "before the circuit court can grant attorney's fees, costs, or penalties, under this subsection,

the party seeking such awards must prevail against the agency and the court must make a finding that the agency willfully withheld the records in violation of KORA. Because the action was dismissed without any finding by the circuit court, the Courier-Journal is not entitled to attorney's fees or other awards under [the statute]." (*The Courier-Journal v. Louisville/Jefferson County Metro Government*, No. 2021-CA-0007-MR, Kentucky Court of Appeals, Feb. 18)

The Federal Courts…

Judge Christopher Cooper has ruled that the Department of State failed to show that **Exemption 5 (privileges)** justifies its deliberative process privilege claims in response to a FOIA request from CREW for records concerning White House directions in 2020 to several agencies – including the State Department – to rebuff efforts at oversight from Democratic chairs of various House committees but cooperate in full with requests by the Republican heads of Senate committees. The State Department disclosed 12 records with redactions under Exemption 5. Cooper indicated that CREW's challenges fell into three groups – (1) records related to responses to specific congressional inquiries, (2) several emails related to other congressional document requests, and (3) allegedly purely factual material from an internal progress report about responses to congressional document requests. Cooper found State had shown that the records relating to congressional inquiries were predecisional but that the agency had not shown that they were deliberative under the D.C. Circuit's most recent rulings in *Reporters Committee v. FBI*, 3. 4th 350 (D.C. Cir. 2021) and *Judicial Watch v. Dept of Justice*, 20 F. 4th 49 (2021). He pointed out that "the State Department's evidentiary submissions, made shortly after or before the D.C. Circuit's most recent pronouncements, do not include the level of detail the Court now needs to evaluate the deliberative nature of the emails and draft letters. In particular, the Department has not told us 'who prepared the' emails or drafts 'or to whom they were addressed,' nor anything about the 'nature of the decisionmaking authority vested' in the various players, including their 'relative positions in the agency's chain of command.'" He indicated that "Courts in this district have long held that agency discussions about 'how to respond to questions from Congress about matters of agency policy qualify as deliberative.' But the Court cannot, on the record here, determine whether the material at issue constitutes the type of back-and-forth exchange of ideas that the deliberative process privilege protects." Because the emails contained in the second category of records were similar to those in the first, Cooper again found that the agency had shown they were predecisional but failed to show they were also deliberative. He noted that "in general, the Department asserts that these documents are deliberative only because they 'reflect the give-and-take of preliminary views' on each subject. Once again, the Department has failed to offer the information the D.C. Circuit has indicated is needed to determine whether the documents are deliberative, including the roles and relative positions of the senders and recipients of the emails; details of the specific decisionmaking process; and the way the redacted material aided in that process." The third category of records consisted of a weekly report summarizing the agency's progress in processing various FOIA requests and congressional document requests. Here, Cooper observed, that "the problem for the State Department is that the redacted information is neither itself deliberative, nor the type of factual material that can be shielded by the deliberative process privilege." He added that "the material withheld from the IPS Weekly Activities Report is not inherently deliberative. The Department contends that the redacted numbers *themselves* are deliberative because they represent, in effect, a tally of every time the Congressional Document Production branch evaluated a document and deemed it potentially worthy of production." He noted that "rather, each of the CDP's assessments seems to be binary – responsive or not. And once those individual determinations are divorced from the specific documents at issue, the Court struggles to see what deliberative judgment can be gleaned from the total." He also rejected the agency's **foreseeable harm claim** for the third category of records and ordered the agency to disclose them entirely. (*Citizens for Responsibility and Ethics in*

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Washington v. U.S. Department of State, Civil Action No. 20-2044 (CRC), U.S. District Court for the District of Columbia, Feb. 11)

A federal court in California has ruled that the FBI and the Executive Office for U.S. Attorneys must complete the processing of Harold Pick's FOIA requests concerning its investigation of Nicholas DeLuca, which led Motorola to ultimately sue Pick for copyright infringement. Pick ran a radio-servicing shop, which was raided by the FBI in 2004 because of Pick's unsuspecting involvement with a convicted conman, Nicholas DeLuca. DeLuca was ultimately charged with stealing radio parts from Motorola Solutions. Pick was never charged with a crime but was sued by Motorola for copyright infringement. Pick suspected the FBI gave Motorola the hard drives the FBI confiscated from Pick during the raid, which formed the basis of Motorola's copyright infringement action. Pick submitted FOIA requests to the U.S. Attorney's Office and the FBI concerning the FBI's alleged involvement with the Motorola suit. EOUSA issued a *Glomar* response neither confirming nor denying the existence of records. Pick appealed that decision to the Office of Information Policy, which remanded the request back to EOUSA to conduct a search. EOUSA claimed it had no record of receiving the remand so Pick heard nothing from EOUSA until he filed suit. The FBI told Pick it had no records but when he contacted the Detroit Field Office that office quickly produced a two-page relevant document. Pick then filed suit against both agencies. Both agencies identified responsive records but Pick still had heard nothing substantive from either agency 14 months later. Although Pick had filed a motion for summary judgment, the agencies insisted that they would not respond to Pick's motion until they had completed processing his requests and provided an index explaining their exemption claims. But District Court Judge John Holcomb noted that "the Federal Rules of Civil Procedure necessarily govern this case, notwithstanding that Defendants may be used to handling FOIA requests in their own way. Those rules clearly provide that 'a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.'" The agencies argued that because of resource restraints they could only move as quickly as those limited resources allowed. Holcomb pointed out that "while the Court is deeply sensitive to those realities – and considers them in formulating an appropriate remedy – the availability of USAO staff or resources is not relevant to Pick's ability to move for summary judgment under the Federal Rules of Civil Procedure, let alone his statutory rights under the FOIA. Indeed, when an agency's FOIA program fails to produce 'efficient and appropriate' results, current policy holds that those programs 'should be reformed' – not that the FOIA requestor should be told to wait." Holcomb concluded that "Defendants have had more than a year to ponder their Opposition to Pick's Motion. They have had ample opportunity to raise and to argue the merits of any exemptions. Yet Defendants have not capitalized on those opportunities; they have not made a single argument justifying *any* exemption, despite actively withholding documents on the same grounds that the OIP rejected. The government cannot simply drag its feet indefinitely." (*Harold Pick v. Motorola Solutions, Inc., Federal Bureau of Investigation, et al.*, Civil Action No. 20-08011-JWH-PVC, U.S. District Court for the Central District of California, Feb. 10)

A federal court in New Hampshire has ruled that U.S. Customs and Border Protection properly responded to FOIA requests from the ACLU of New Hampshire concerning the agency's immigration patrol operations in New Hampshire. Based on two incidents involving plainclothes agents who arrested individuals miles from the Canadian border, the ACLU of New Hampshire filed two FOIA requests with the agency asking for records concerning roving patrol operations. The agency provided two responses that included 108 I-213 forms, which are similar to police reports and document the details of an arrest of a non-citizen. As part of discussions during litigation, CBP agreed to disclose more information from 14 I-213s but not for the remaining 94 I-213s. The agency also provided three separate *Vaughn* indices. The ACLU of New Hampshire argued that the indices did not explain why CBP withheld in full 94 of the I-213s, and why the agency had failed to consider segregation of the withheld materials. While the agency contended that the

ACLU of New Hampshire's primary concern was the adequacy of its search rather than the issue of segregability, the court indicated that both issues could be examined in tandem. Judge Landya McCafferty explained that the agency initially decided that all 108 I-213s were responsive, but once the agency had looked more closely at the ACLU's requests, it concluded that only the 14 I-213s for which it provided more information were actually responsive and that the remaining 94 I-213s were not responsive to the ACLU's requests. McCafferty noted that "the change of course during the 'additional review' alone does not justify CBP to turn over these purportedly non-responsive I-213s." But McCafferty observed that "the ACLU has raised a reasonable concern about whether the 94 I-123s are responsive to its request. Although the fact that the documents were initially produced does not alone call into question the adequacy of the search, that issue coupled with the language of [the affidavit] raise a reasonable concern. . .[T]he contested items here are a discrete list of documents that are already before the court, and thus it should be a minimal burden to CBP to file a supplemental affidavit detailing its process and reasoning." The ACLU claimed that the agency's *Vaughn* indices were insufficient to justify it exemption claims. However, McCafferty indicated that "CBP has detailed why it believes certain information is exempted, and that justification is detailed enough that it affords ACLU an opportunity to consider whether the information is, in fact, exempted." (*American Civil Liberties Union Foundation of New Hampshire v. United States Customs and Border Protection*, Civil Action No. 19-977-LM, U.S. District Court for the District of New Hampshire, Feb. 22)

Judge Colleen Kollar-Kotelly has distinguished the holding in *Price v. U.S. Dept of Justice Attorney's Office*, 865 F. 3d 676 (D.C. Cir. 2017), in which the D.C. Circuit seemed to rule decisively against recognizing waivers of FOIA rights as part of a plea agreement, concluding instead that prisoner James Graham waived his right to records from the FBI concerning the search warrants issued during its investigation of Graham on charges of child pornography through his later plea agreement. After receiving Graham's FOIA request, the FBI declined to process it because Graham had waived his right to make a FOIA request as part of his plea agreement. Kollar-Kotelly explained that *Price* held that "in deciding whether to enforce the waiver provision at issue in this case, the Court must weigh any public policy harms identified by plaintiff against justice interests identified by the government." She noted that "plaintiff has not identified a plausible 'harm to public-policy that enforcement [of this agreement] would cause.'" She pointed out that "with respect to plaintiff's original FOIA request, then, the Court finds that defendant is entitled to summary judgment based on the waiver provision in the irrefutably valid plea agreement." (*James Martin Graham v. United States Federal Bureau of Investigation*, Civil Action No. 20-210 (CKK), U.S. District Court for the District of Columbia, Feb. 11)

A federal court in California has ruled that the Department of Homeland Security has not shown that Mark Graham **failed to exhaust his administrative remedies** because he filed suit more than six years after the agency contended his litigation claim accrued. The agency argued that Graham's claim accrued on May 17, 2013, 20 days after U.S. Immigration and Customs Enforcement received Graham's appeal. However, Graham claimed that his right to sue did not accrue until December 4, 2013, when ICE sent him a letter explaining that the agency would not be providing additional documents and indicating that this was the agency's final action on his request. Graham originally filed several requests with ICE in 2011. The agency provided some of the requested records in February 2013. Graham appealed in April 2013. As a result of Graham's appeal, the agency remanded the request to ICE for further review and reprocessing. ICE provided a partial response and denial in October 2013. Graham filed a second appeal, which was denied in the letter of December 4, 2013, which included information on how to seek judicial review. Magistrate Judge Jeremy Peterson began by explaining that the original D.C. Circuit ruling in *Spannaus v Dept of Justice*, 824 F. 2d 52 (D.C. Cir 1987), in which the D.C. Circuit had first indicated that the six-year statute of limitations applied to

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FOIA actions, was subsequently overturned by the Supreme Court in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015) and that the D.C. Circuit had subsequently recognized in *Jackson v. Modly*, 949 F. 3d 763 (D.C. Cir. 2020), that the Supreme Court's ruling in *Kwai Fun Wong* had overruled *Spannaus*. Peterson then rejected the agency's claim that Graham had exhausted his administrative remedies after the six-year statute of limitations deadline expired. Instead, he pointed out that "I cannot agree that the statute compels either the agency or this court to ignore a timely remand. A remand of a live information request forestalls constructive exhaustion by establishing that the agency's decisional process is ongoing. Defendants' reading would require FOIA requestors to jump the gun and file suit in federal court while the agency's consideration of an appeal is ongoing – even though the agency might grant the information request without court involvement. Such a result would undercut the basic rationale of the exhaustion requirement: preventing premature judicial interference with agency decision-making. It would also waste court resources. I share the view of courts that have barred plaintiffs from bringing suit while remand is pending – constructive exhaustion – and thus claim accrual – does not result from a timely remand." Peterson concluded that "I find both that plaintiff was required to exhaust his remedies and that the timely remand at issue here prevented constructive exhaustion. Plaintiff's remedies were exhausted when the agency's decisional process had run its course, which occurred on December 4, 2013, when he received ICE's final decision – identified as such by the agency – on appeal." (*Mark E. Graham v. United States Department of Homeland Security, et al.*, Civil Action No. 19-02429-TLN-JDP (PS), U.S. District Court for the Eastern District of California, Feb. 18)

In the first litigation under the Sunshine Act in years, Judge Christopher Cooper has ruled that changes in the make-up of the appointment mechanism made when Congress turned the former Overseas Private Investment Corporation – which was subject to the Sunshine Act – into the U.S. International Development Finance Corporation – meant the newly constituted agency was no longer subject to the Sunshine Act because it no longer had a majority of its board members appointed by the President, a definitional requirement of the statute. After DFC published a notice in the Federal Register indicating that it was no longer subject to the Sunshine Act, the Center for Biological Diversity, Friends of the Earth, and the Center for International Environmental Law, filed suit, arguing that all three organizations relied on the existence of public meetings at the former OPIC to keep track of projects being funded by the agency that might affect the environment. Cooper first found that the organizations had standing to bring their suit. He also noted that they had shown that they had suffered an informational injury by no longer being able to attend the agency's meetings. The agency argued that the organizations had not shown that they suffered an informational injury because they had not requested to attend any meeting and were denied access as a result. But Cooper rejected the claim, noting that "the elements of informational standing. . .do not require plaintiffs to lodge a specific request for information; they only have to allege a deprivation of information required to be disclosed by statute, which plaintiffs have done here. Consistent with that requirement, the D.C. Circuit has upheld informational standing under similar situations without requiring an advance information request." The public interest groups argued that the rule change violated the Administrative Procedure Act by altering the legal rights of the public, while the agency claimed it was nothing but a procedural change that did not affect legal rights. Cooper explained that "the Sunshine Act Rule meets both definitions. In the most literal sense, the rule does 'alter the rights' of the public – the public had a statutory right to receive notice and attend DFC meetings before the rule was issued and the rule extinguished that right. And this wholesale elimination of procedural rights under the Sunshine Act is more significant than the more interpretative and discretionary administrative changes at issue. . ." However, Cooper indicated that he did not have to decide that issue because DFC no longer met the definition of an agency under the Sunshine Act. He explained that "to be an 'agency' subject to the Sunshine Act, the agency must be 'headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President and with the advice of the Senate.' The DFC board of directors has nine members. Four members are appointed directly to the board by the President. Four other members are officers from other agencies – the Secretary of State, the Administrator

of USAID, the Secretary of the Treasury, and the Secretary of Commerce (or their designees). The final board member is the CEO of the DFC." Cooper indicated that because the CEO of the DFC was a statutory member because of his status, he was not appointed to the board by the President. Coper pointed out that "the plaint text of the Sunshine Act provides that the statute applies only if a majority of the agency's board members are 'appointed *to such position* by the President with the advice and comment of the Senate.' OPIC's board had eight such members out of fifteen, whereas the DFC's board now has only four out of nine. And Congress gave no indication one way or the other as to how it wished the DFC to be treated for Sunshine Act purposes. Therefore, the Sunshine Act does not apply to the DFC." (*Center for Biological Diversity, et al. v. U.S, International Development Finance Corporation*, Civil Action No. 21-1491, U.S. District Court for the District of Columbia, Feb. 11)

A federal court in New York has ruled that the Innocence Project is entitled to access archival records from the National Museum of Health and Medicine that would be exempt under the **Privacy Act** because disclosure is permitted under (b)(11), which allows disclosure pursuant to a court order. The Innocence Project filed suit to obtain access to the archives of the American Board of Forensic Odontology, which was housed at the National Museum of Health and Medicine. While the Innocence Project was allowed to inspect the records, which pertained to alleged perjury by a forensic odontologist in the course of the organization's ethics investigation of another forensic odontologist, it asked Judge Alison Nathan of the Southern District of New York to issue a protective order allowing public disclosure. The government filed a motion indicating that it did not oppose disclosure. Alison agreed that disclosure was appropriate. She noted that "plaintiff has adequately demonstrated that the report may be relevant to one or more ongoing state-court proceeding because it allegedly my demonstrate that an important expert witness committed perjury. The outcome of those proceedings could affect the liberty of criminal defendants. Criminal defendants have a weighty, though not unqualified, right to present a complete defense. An important aspect of that right is the right to cross-examine adverse witnesses, including by impeaching those witnesses' credibility. This interest favors broad disclosure of the report for use not only in the pending state proceeding originally identified by Plaintiff but also in several other proceedings identified in Plaintiff's later status report." She observed that "the precise context of this document is not clear to the Court. Regardless, it does not alter the Court's conclusion that disclosure is warranted here. First, the report at issue does not contain any personally identifying information like social security numbers, medical records, or personal contact information. Second, the Museum's promise not to disclose information covered by the Privacy Act does not deprive this Court of the authority to order disclosure under an exception to the Privacy Act." (*The Innocence Project, Inc. v. National Museum of Health and Medicine, et al.*, Civil Action No. 19-1574 (AJN), U.S. District Court for the Southern District of New York, Feb. 11)

Judge Timothy Kelly has ruled that neither Stanley Young nor Louis Anthony Cox have shown that they will suffer irreparable harm absent a preliminary injunction under the **Federal Advisory Committee Act** halting the scheduled meetings of EPA advisory committees on which they had served as industry representatives because absent their viewpoints, the committees are no longer fairly balanced under FACA. The Clean Air Scientific Advisory Committee is charged with advising the EPA Administrator on new air quality standards and proposed revisions to existing ones. In March 2021, the EPA Administrator reconstituted the existing committee, dismissing all members of the existing committee. He received 115 candidate nominations and 88 public comments for the vacant Committee spots. Before the Committee was reconstituted, Young had served on the Board but not the Committee, while Cox had served on both the Committee and the Board. Young was nominated for Committee membership but ultimately was not selected as a member or an alternate. After neither Young nor Cox were appointed to the Committee, they filed suit to

block the Committee from meeting because without any industry representatives on the Committee it would be unfairly balanced within the meaning of FACA. Kelly pointed out that "the harm Plaintiffs allege Young will suffer if the Committee's meetings go forward is best understood as the loss of a chance to participate in those meetings." He then indicated that "Plaintiffs have not shown that Young's alleged loss of a chance is sufficiently 'great' to warrant preliminary injunctive relief. . .[I]t bears repeating, Young has not argued that he has a right to serve on the Committee because of his personal perspective is unique in some way among the applicants, even if it does differentiate him from those selected. Thus, there is nothing in the record suggesting that Young has lost a 'great' chance at being selected to serve on the Committee, and to participate in the upcoming meetings. . . Whatever chance Young may be losing here, the Court has no basis to conclude it was sufficiently 'great.'" Kelly added that "Plaintiffs have not shown that any of these alleged harm are irreparable in that they are 'beyond remediation.'" Declining to issue a preliminary injunction, Kelly nevertheless allowed the suit to continue on its merits as to whether Young could show the reconstituted Committee was unfairly balanced for FACA purposes. He observed that "Plaintiffs do not suggest that the Court would lack the authority to order the EPA Administrator to reconstitute the Committee lawfully and, if necessary, order the Committee to provide new recommendations relating to the enactment of any new particulate matter air quality regulations." (*S. Stanley Young, et al. v. United States Environmental Protection Agency, et al.*, Civil Action No. 21-2623 (TJK), U.S. District Court for the District of Columbia, Feb. 16)