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Washington Focus: Attorney General Merrick Garland issued a new Freedom of Information Act Guidelines in March in conjunction with Sunshine Week. In describing the memo's contents, the Department of Justice's Office of Public Affairs noted that the guidelines direct "heads of all executive branch departments and agencies to apply a presumption of openness in administering the FOIA and make clear that the Justice Department will not defend nondisclosure decisions that fail to do so. The guidelines also emphasize that the proactive disclosure of information is fundamental to the faithful application of the FOIA and note the Justice Department's efforts to encourage proactive agency disclosures. . ."

Court Finds 11,000-Plus Pages Not Protected by Rule 6(e)

Judge Christopher Cooper has indicated that the crusade of Penn State alumnae Ryan Bagwell to reveal as much as he can about the University's attempt to make the Jerry Sandusky scandal disappear into history still has considerable legs and is not likely to end any time soon. In his most recent ruling in Bagwell's federal FOIA litigation against the Justice Department for access to records in the possession of the Executive Office for U.S. Attorneys directly concerning the investigation of Pennsylvania's Attorney General into the Sandusky scandal and its subsequent cover-up by Penn State, Cooper found that EOUSA has failed to explain how 11,648 pages of emails belatedly discovered by the agency can possibly be categorically protected under Rule 6(e) on grand jury secrecy.

Bagwell started to request records under Pennsylvania's Right to Know Law soon after the State's investigation, led by former FBI Director Louis Freeh, became public. In 2015 he started to litigate against federal agencies, including DOJ as well as the Department of Education.

In responding to Bagwell's request, EOUSA disclosed 517 pages, withholding 104 others. When the case reached Cooper, he ordered a second search of the U.S. Attorney's Office email system. While preparing its renewed motion, DOJ realized it had failed to provide approximately 260,800 pages of potentially responsive electronic records. In his next

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ruling, Cooper found the agency's renewed search of its email system was inadequate because it did not include commonly used terms for referring to Penn State University. Cooper also rejected EOUSA's claim that the records were protected by Exemption 7(A) (interference with ongoing investigation or proceeding). In his current ruling, Cooper considered the inadvertently overlooked records, for which Bagwell had agreed to narrow his search request to include a smaller subset of relevant individuals. He also considered the remanded records, which included 45 pages released in full by EOUSA and 153 pages in part. EOUSA also withheld 256 pages. Bagwell challenged several exemption claims and also argued that his request was governed by the 2016 FOIA Improvement Act, particularly its foreseeable harm requirements.

Addressing DOJ's claim that Rule 6(e) prohibited disclosure of all the email records, Cooper explained DOJ's argument that "Exemption 3, in conjunction with Rule 6(e), permits withholding of the entirety of the inadvertently overlooked records because releasing 'emails obtained by grand jury subpoena from Pennsylvania State University is likely to pierce the veil of secrecy over the direction of the grand jury investigation.'" However, Bagwell contended that the government had not shown disclosure of the records would reveal some protected aspect of the grand jury process. Cooper indicated that "Bagwell has the better of this argument." He pointed out that "the Rule does not prohibit the 'disclosure of information coincidentally before the grand jury [which can] be revealed in a such a manner that its revelation would not elucidate the inner workings of the grand jury.'"

Cooper noted that "DOJ claims, in effect, that revealing almost *any* material obtained via a grand jury subpoena would tend to improperly reveal the scope and direction of the grand jury's investigation, but binding D.C. Circuit case law precludes the Court from applying such a broad rule. *Labow v. Dept of Justice*, 831 F. 3d 523 (D.C. Cir. 2016) –a case the Department fails to grapple with or even cite – squarely addresses this issue. There, the D.C. Circuit evaluated DOJ's decision to withhold 'copies of specific records provided by a federal grand jury in response to federal grand jury subpoenas' on the ground that they 'could reveal the inner workings of a federal grand jury.' The court rejected this blunt approach, reasoning that 'the mere fact the documents were subpoenaed' would 'not necessarily reveal a connection to a grand jury.'" Cooper observed that "that analysis applies to DOJ's blanket withholding attempt here."

Cooper pointed out that "on the current record – with all 11,000-plus pages described in a single *Vaughn* index entry – it is impossible to tell whether any concerns about grand jury secrecy are in fact implicated by the documents here. DOJ says only that the revelation of emails containing certain names during certain timeframes could shed light on the 'timeline that is of interest to the grand jury,' as well as the 'individuals who could have been called as witnesses to the grand jury.'. . .And significantly, DOJ never avers that *all* 11,000 pages contain potentially sensitive information, nor that Bagwell would be able to reconstruct anything specific about the target or direction of the investigation from such a large data set. While the Department may take a categorical approach with its disclosures, those categories must be specific enough to permit a meaningful inquiry using the standards the D.C. Circuit has provided."

Ordering the agency to provide more information about what was in the records, Cooper indicated that "these concerns must be left for another day, because (as in *Labow)* the government has provided scant explanation as to why these documents would reveal anything about the grand jury, its investigation, or deliberations. The Court is particularly mindful of the size of the subpoena return here – totaling more than 11,000 pages. That large a set may include many documents only 'coincidentally' before the grand jury and may not reveal much about the investigation when viewed together. If the Department, after full review, continues to believe that disclosing some or all of these documents risks intrusion into the protected sphere of the grand jury, it may submit a more detailed declaration and *Vaughn* index, along with any applicable caselaw, explaining why this is so."

Cooper then rejected the agency's claim that the grand jury records were protected by Exemption 7(D) (confidential sources). He noted that "DOJ has not shown that Penn State was granted confidentiality, either expressly or by implication. As an initial matter, the Department does not argue that the University was ever expressly offered confidentiality. But it does contend that a guarantee of confidentiality can be inferred because Penn State furnished these records to 'federal investigators solely under the presumed confidentiality of the grand jury investigation.'" He observed that "in DOJ's view, essentially any recipient of a subpoena issued by a grand jury investigating a serious or sensitive crime, when submitting evidence pursuant to a subpoena, could infer that a confidentiality agreement exists. But DOJ points to no case to support such a broad approach to confidentiality, nor could the Court find one. And that is likely for good reason; DOJ's rule would eviscerate the well-established, carefully drawn limits on the invocation of grand jury secrecy under Exemption 3 catalogued above." That left DOJ with only Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records) to support all the exemption claims for the 11,000-plus records. Cooper observed that "but DOJ never claims that these two exemptions could justify the complete withholding of all 11,648 pages of inadvertently overlooked records."

Cooper rejected Bagwell's claim that the 2016 FOIA Improvement Act – including its foreseeable harm test – applied to his litigation. But Cooper pointed out that "Bagwell made his request in April 2014 – two years before the stated effective date [of the FIA]. He nevertheless urges the Court to find that FIA applies retroactively, pointing out that the statute does not say it *only* applies to requests made after the enactment date." Cooper explained that "the Court located several cases – including binding D.C. Circuit precedent – expressly declining to apply the FIA's foreseeable harm standard because the relevant requests were made before June 2016. Given the plain terms of the statutory language and the uniform conclusion of decisions directly addressing the retroactivity question, the Court will not apply the FIA to this April 2014 FOIA request." (*Ryan Bagwell v. U.S. Department of Justice*, Civil Action No. 15-531 (CRC), U.S. District Court for the District of Columbia, March 1)

The Federal Courts…

Judge James Boasberg has ruled that the Department of the Army has not yet shown that copyrighted material is protected under **Exemption 4 (commercial and confidential)** in responding to a FOIA request from Sarah Naumes, a Ph.D. student in the Department of Politics at York University in Toronto, Canada. Naumes requested all versions of the Global Assessment Tool (GAT) questionnaire dating from 2008 to the present, including questionnaires designed for soldiers, spouses, and Army civilians. She also requested the informed consent forms utilized with different versions of GAT, and a list of recommendations given under the ArmyFit portal. The GAT is an online survey on the ArmyFit portal combining objective health and fitness metrics with survey-based questions that provide the user with a variety of scores and metrics for personalized self-development training in a variety of formats. In response to Naumes' queries as to why the processing of her request was taking so long, the Army admitted that its FOIA officer position had been vacant for a period of time. Ten months later, the officer handling her case told her he thought the Army had already responded to her request. After having waited two and a half years without any response, Naumes filed suit. The agency responded to the first two portions of her request, disclosing 773 GAT survey questions but withholding 534 others under Exemption 4. All informed-consent forms were produced since they were included with the surveys themselves. A list of recommendations was disclosed, containing five pages of screenshots. Naumes complained about the excessive amount of time the Army took in responding to her request. Although he expressed sympathy for her plight, Boasberg noted that "the only penalty warranted here is to prohibit the Army from relying on administrative exhaustion, which it does not do anyway." Naumes

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faulted the agency's search because it did not find a survey on basic training that she believed existed. However, Boasberg agreed that the agency had consulted with a subject matter expert who confirmed that there was no separate basic training survey. Approving of the agency's search, Boasberg noted that "despite the confusion about the different categories of the GAT, Defendant has described a good-faith effort to identity this document. Having determined that a fourth category of the GAT for Basic Training did not exist, it was 'under no duty to disclose documents not in its possession,' which would include any associated informed-consent forms." Naumes argued that the agency should have provided her with links included in the screenshots of the recommendations. While the agency claimed this would require it to create a record, Boasberg indicated that "since those files can be accessed and provided to Plaintiff without the creation of new records, the Court will order that Defendant produce the webpages identified at the relevant links in the screenshots already produced to Plaintiff. The Army need not, however, create a list of all recommendations given to anyone who has taken the GAT." Addressing the Army's Exemption 4 claim, Boasberg explained that "the crux of this case is whether Exemption 4 protects the withholding of 534 GAT survey questions that come from copyrighted sources. The Army does not hold the copyright to these sources; rather, the copyright is held by the publishers or other creators of the sources." He pointed out that "for the questions to remain redacted, they must satisfy each prong of the exemption, which the Army claims the questions do because they are copyrighted." Assessing the copyright holder's interest, he indicated that "the copyright holder thus naturally has a commercial interest in the information that he seeks to protect," concluding that "the materials satisfy the first prong inasmuch as routine release of copyrighted information through FOIA requests would undermine the market for the creator's work in much the same way that the release of other types of commercial information could inflict competitive harm." But to be protected under Exemption 4, information must be obtained from a third party and is not protected if the information has been incorporated by the agency as part of its own analysis. Indicating that the Army had not sufficiently distinguished the case here, Boasberg noted that "the court will thus require that the Army provide supplemental briefing as to how, if at all, the questions were adapted from the copyrighted sources." He agreed with Naumes that many of the questions were based on materials readily available online. He pointed out that "the Army must thus release the withheld questions from any sources available publicly at no charge." As to the other copyright holders, Boasberg explained that "it is the better path to request the Army to confer with the copyright holders for the remaining non-public source materials about whether they in fact treat those materials as confidential." Boasberg rejected Naumes' argument that the agency must show that people who took the GAT were themselves bound by confidentiality agreements. Instead, he indicated that "although some tests are registered as 'secure tests' to shield copyright materials, it is not required that a test have been registered for the underlying material involved to receive copyright protection." Boasberg also found the Army had shown disclosure could cause **foreseeable harm**, noting that "defendant has sufficiently laid out the basis of its foreseeable harm from disclosing copyright information." He rejected Naumes' claim that as a student she was covered by the fair-use doctrine. Instead, he explained that "the applicability of the fair-use doctrine specifically to Plaintiff's dissertation research thus cannot outweigh Defendant's determination of foreseeable harm when the material is to be released to the public overall." (*Sarah Katherine Naumes v. Department of the Army*, Civil Action No. 21-1670 (JEB), U.S. District Court for the District of Columbia, Feb. 28)

Judge Randolph Moss has ruled that the Executive Office for U.S. Attorneys properly withheld records from Peter Bernegger, who was serving a prison sentence after being convicted of mail and bank fraud in the Northern District of Mississippi after showing that Bernegger **failed to exhaust his administrative remedies** when he did not pay assessed fees for processing his FOIA request. In response to Bernegger's request for records concerning his conviction, EOUSA located more than 9,000 responsive pages. After indicating that Bernegger was entitled to 100 free pages, the agency assessed a fee of $442.50 for the remaining 8,850 pages. Instead of paying the assessed fee, Bernegger filed an administrative appeal with the Office of Information Policy, arguing that he deserved a public interest fee waiver. OIP remanded the issue to EOUSA, which

rejected Bernegger's claim. Bernegger filed a second appeal. This time, OIP upheld EOUSA's decision that Bernegger was not entitled to a fee waiver. Bernegger argued that the agency had failed to conduct an adequate search. But Moss noted that "but that contention, along with Bernegger's demand for a *Vaughn* index, ignores the plain text of the governing regulation, which provides that the relevant Department of Justice component need not 'begin to process the request' until the payment is made. The EOUSA, accordingly, need not defend the adequacy of its search, unless Bernegger can show that he was entitled to a fee waiver." In response, Bernegger argued that his criminal trial was rife with fraud and corruption. Moss found Bernegger's arguments inadequate, noting that "even assuming that a fraud of the nature that Bernegger alleges would constitute a matter of public interest, his filings lack any reasonable basis to conclude that the requested 'documents would increase public knowledge of the function of government.'" Moss also indicated that Bernegger "has failed to demonstrate that he has the 'ability and intention to effectively convey or disseminate the requested information to the public.' Here again, Bernegger offers no colorable argument in his opposition to the EOUSA's motion." He observed that "in this case, Bernegger's failure to elaborate on his plans to disseminate the requested information further supports OIP's decision denying his waiver request." (*Peter M. Bernegger v. Executive Office for United States Attorneys*, Civil Action No. 18-908 (RDM), U.S. District Court for the District of Columbia, Feb. 25)

Judge Reggie Walton has resolved most of the remaining issues after the third remand of prisoner Elwood Cooper's FOIA litigation from the D.C. Circuit. After being convicted on drug trafficking charges, Cooper requested records from the DEA, the Executive Office for U.S. Attorneys, the U.S. Marshals Service, Customs, and the Bureau of Alcohol, Tobacco and Firearms concerning his conviction. Cooper originally filed suit in 1999 and his case went back and forth between the district court and the D.C. Circuit, most recently in 2018. In that third remand, the D.C. Circuit ordered the district court to revisit the agencies' earlier exemption claims and determine whether the agencies had **conducted an adequate search**. Walton first dismissed EOUSA from the case after finding that Cooper had not **exhausted his administrative remedies** because he had failed to pay a $602 fee assessed by the agency for processing the records. Walton noted that "the plaintiff has not demonstrated that he exhausted his administrative remedies by paying the fees required by the FOIA and the Justice Department regulations." Walton next found that while the DEA had shown that it conducted an adequate search for records, neither ATF nor Customs had shown the requisite degree of explanation and ordered the agencies to provide more details. Turning to the exemption claims, Walton indicated that the DEA, the Marshals Service, the ATF, and Customs had all shown that they properly redacted records concerning three cashiers' checks that resulted from sale of Cooper's vehicles under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. He also found the agencies had properly protected informants under **Exemption 7(D) (confidential sources)**. Although Customs had originally withheld records under **Exemption 2 (internal practices and procedures)** before *Milner* was decide in 2011, Walton agreed with the agencies that **Exemption 7(E) (investigative methods and techniques)** now covered such records. Walton faulted inconsistencies in the DEA's *Vaughn* index and ordered the agency to supplement its index to provide more information. Finally, he indicated that neither the DEA, the ATF, nor the Marshals Service had sufficiently explained their **segregability analyses** and ordered those agencies to supplement their indices to provide further explanation. (*Elwood J. Cooper v. United States Department of Justice, et al.*, Civil Action No. 99-2513 (RBW), U.S. District Court for the District of Columbia, March 1)

Judge Emmet Sullivan has ruled that the Office of the Inspector General of the U.S. Postal Service **conducted an adequate search** and properly withheld records from David Braun concerning records produced from contacts with OIG from his previous 2015 request and complaints made on or about five specific dates. The agency disclosed 266 pages in full, three pages with redactions under **Exemption 5**

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(privileges) and **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, and 50 pages with redactions under Exemption 7(C). Braun filed an administrative appeal and this time the agency disclosed 309 pages in full, the same three pages, this time redacted only under Exemption 7(C), and removed the previous redactions for 53 pages that had been made under Exemption 5 and Exemption 7(C). Sullivan agreed with the agency that its search was adequate. He noted that the agency's affidavits were "reasonably detailed, they set forth the type of searches performed and the search terms used, and they explained why the files that were searched were likely to contain responsive materials." Sullivan also concluded that the agency's redactions under Exemption 7(C) were appropriate. He pointed out that "pursuant to the mandatory authority in this Circuit, the Court concludes that the Agency properly withheld under Exemption 7(C) the identities of the law enforcement personnel in light of the privacy interest the personnel have in nondisclosure of their identities and the lack of a significant public interest in the identities of the personnel." (*David S. Braun v. United States Postal Service, et al.*, Civil Action No. 18-2914 (EGS), U.S. District Court for the District of Columbia, March 1)

Judge Royce Lamberth has allowed pro se litigant John Eakin to amend his FOIA suit against the Department of Defense to require the agency to continue to process archival records on World War II era Individual Deceased Personnel Files for disclosure as they continue to become available in digital form. After winning his suit to force the agency to disclose all personnel files for servicemembers with last names starting with A-L, Eakin next asked for all files labeled M-Z, which also now exist in digital form. DOD argued that Eakin had waited too long to seek amendment. But Lamberth observed that "Eakin has fully explained his failure to amend his pleadings within the original deadline. When Eakin first filed this litigation, the M-Z IDPFs did not exist in digital format. It was impossible for Eakin to include these documents in an amended pleading – and, indeed, he tried to do so – because he could not exhaust his administrative remedies. 'Absent a new FOIA request,' the court was 'without power to order [DOD] to produce the digitized M-Z files.' Eakin filed the present motion only after receiving notice that DOD *had* completed the digitization process. So, in short, Eakin filed this motion as soon as it was feasible." (*John Eakin v. United States Department of Defense*, Civil Action No. 16-972-RCL, U.S. District Court for the Western District of Texas, March 2)

Judge Carl Nichols has ruled that the Department of Justice properly responded to a request from Francis Block for records concerning himself from the office of the U.S. Attorney for the Western District of Michigan. EOUSA disclosed 471 pages in full and 203 pages with redactions. EOUSA also referred nearly 300 pages of those records to the DEA. The DEA disclosed one page in full, 149 pages in part and withheld 130 pages in full. Block filed suit arguing primarily that the DEA had failed to provide a *Vaughn* index. Nichols acknowledged that the DEA initially failed to file a *Vaughn* index, but after he ordered the agency to do so, he found the index provided was sufficient to carry the agency's burden of proof. Nichols turned to the exemption claims, noting that Block provided no objection to any of them. Referring to **Exemption 7(F) (harm to safety to persons)**, he observed that "these redactions are all in relation to the drug trade, which is often the subject of violence." Nichols found the agencies' **segregability analysis** was appropriate. He pointed out that "the high number of documents that were only partially redacted rather than withheld in full adds support to the government's position. Block complained that, of those documents that were released, the 'vast majority are completely redacted.' But Block has not objected to any particular redaction, nor has he presented *any* quantum of evidence that the government withheld reasonably segregable materials." (*Francis Damien Block v. United States Department of Justice, et al.*, Civil Action No. 19-03073 (CJN), U.S. District Court for the District of Columbia, March 8)

The First Circuit has rejected Harvard history professor Jill Lepore's attempt to gain access to sealed archival transcripts of the grand jury proceedings related to the government's attempts to prosecute Daniel Ellsberg for disclosing the Pentagon Papers in 1971. Lepore was writing a book about the Simulmatics Corporation, which had employed Samuel Popkin, a political scientist who had crossed paths with Ellsberg when they were both in Vietnam. Popkin was subpoenaed by the grand jury investigating Ellsberg but declined to testify about certain subjects and was held in civil contempt. He appealed to the First Circuit. He served eight days in jail but the grand jury that had subpoenaed Popkin was discharged before taking any further action. After learning about Popkin's experience with the grand jury, Lepore requested the grand jury records that were under indefinite seal at the National Archives in Boston. Her FOIA request was rejected by NARA on the basis of Rule 6(e) on grand jury secrecy. Rather than appeal her FOIA denial, Lepore filed suit in district court, asking for release of the records pursuant to the Federal Rules of Criminal Procedure, arguing that the court had inherent authority to release the records because of their historical significance. The district court ruled in favor of Lepore, ordering the records disclosed after finding that Rule 6(e) authorized disclosure. Further, the district court found that it had inherent authority to disclose records of potential interest to historians in the absence of any remaining practical countervailing considerations. At the appellate court, the First Circuit first concluded that there was no authority in Rule 6(e) to disclose the records. The First Circuit noted that "the purposes for which a court may disclose grand jury materials under Rule 6(e) invariably relate to administering judicial proceedings, protecting the integrity of the legal process, and facilitating the prosecution of a criminal offense." The court indicated that "while we may assume without deciding that there exists the inherent authority to order disclosure of grand jury materials in circumstances not expressly anticipated by Rule 6(e)(3), we find in the foregoing no license to order disclosure for purposes other than protecting or furthering the fair administration of justice." (*In Re: Petition for Order Directing Release of Records; Jill Lepore v. United States of America*, No. 20-1836, U.S. Court of Appeals for the First Circuit, Feb. 28)

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