ASAP FOIA-Privacy Act Training Workshop
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Hear Ye: FOIA Updates from the Courts

Presented by Richard Huff and Ryan Mulvey

Procedural Issues

Open America Stays

Democracy Forward Found. v. Dep't of Justice, 354 F. Supp. 3d 55 (D.D.C. 2018): begrudgingly granting *Open America* stay giving OIP additional time to process a request where its requests have increased from 1,800 to 3,400 and its backlog has increased from 578 to 1,800 during the past 2 years, noting that its FOIA positions have decreased during that time as they agency has sought smaller appropriations for such positions; concluding that "[u]nless Defendant's efforts and resource allocation to its responsibilities under FOIA improve in the near future, this court will view less favorably any future stay request [and] urges other judges in this District to do the same."

Daily Caller News Found. v. FBI, No. 18-1833, 2019 WL 2411286 (D.D.C. June 7, 2019): denying an *Open America* stay where the FBI had failed to demonstrate "exceptional circumstances" because (1) any increase of requests it has received was neither "unforeseen or remarkable," (2) there was no evidence that newer requests were more complex, (3) increased involvement in FOIA litigation was a "predictable workload," and (4) the agency had not made "sufficient progress in reducing its backlog"; nevertheless, allowing the FBI its "usual processing rate of 500 pages per month."

Definition of a "Record"

American Oversight v. HHS, 380 F. Supp. 3d 45 (D.D.C. 2019) (appeal pending): finding agencies' interpretation of scope of request for communications from agencies about administrative actions concerning the ACA, and the agencies' subsequent which exclusion of congressional which excluded congressional staff replies in email chains originating with agencies to be "to be unduly literal and stingy, and [ruling] that plaintiff's position [that an e-mail chain is a unified 'record'] is more consistent with the day-to-day reality of electronic communication as well as the general legal principles to be applied in FOIA cases."

Institute for Policy Studies v. CIA, No. 06-960, 2019 WL 3459073 (D.D.C. July 31, 2019): rejecting CIA's segmentation of intelligence summaries into multiple "records" as such an approach "disregards [the records'] original form and function," and is in tension with DOJ "guidance" and "agency practice" on the broader question of the definition of a "record".

Reasonable Description

PEER v. EPA, 314 F. Supp. 3d 68 (D.D.C. 2018): where EPA Administrator Pruitt stated on TV that he "would not agree that [carbon dioxide created by human activity is] a primary contributor to the global warming that we see," and "there's a tremendous disagreement about of [sic] the impact" of "human activity on the climate," and where requester sought all EPA documents relied upon by the Administrator in making these statements, ruling that the request "reasonably describes" records, and they could be located by asking the Administrator which records he relied on; observing that "[w]hen the head of an agency makes a public statement that appears to contradict "the published research and conclusions of" that agency . . . the FOIA provides a valuable tool for citizens to demand agency records providing any support, scientific or otherwise, for the pronouncement."

Foreseeable Harm

Rosenberg v. DOD, 342 F. Supp. 3d 62 (D.D.C. 2018): holding GEN Kelly's emails giving "his opinions about a military commission ruling barring female guards from touching certain detainees, advis[ing] senior officials about the consequences of this ruling for the guard force, and providing recommendations about how the government should proceed under the order and opinions about how the government should handle the equal opportunity complaint" is not is "directed toward decision-making as to law or policy, and that such material is not subject to the deliberative process privilege; even though DOD broke down the deliberative process documents into 12 groups, "the court does not read the statutory 'foreseeable harm' requirement to go so far as to require the government to identify harm likely to result from disclosure of each of its Exemption 5 withholdings. A categorical approach will do."

Judicial Watch, Inc. v. Dep't of Commerce, 375 F. Supp. 3d 93 (D.D.C. 2019): implicitly holding 48 pages subject to deliberative process privilege, but ruling that agency failed to satisfy the "foreseeable harm" test by merely making "boilerplate statements" that disclosure of all pages "could have a chilling effect on the discussions within the agency [and that these] deliberations are essential to ensuring that the right information is delivered to [the] public [and that failure] to have these frank deliberations could cause confusion if incorrect or misrepresented climate information remained in the public sphere."

Machado Amadis v. Dep't of Justice, No. 16-2230, 2019 WL 2211120 (D.D.C. May 22, 2019) (appeal pending): finding the foreseeable harm requirement satisfied because agency "explained that disclosing the information at issue would have a chilling effect on [its] attorneys, who would no longer feel able to discuss their idea, strategies, and recommendations in [the deliberative process records] freely," and tersely concluding that "[t]his is among the harms that Exemption 5 seeks to prevent."

Natural Res. Def. Council v. EPA, No. 17-5929, 2019 WL 3338266 (S.D.N.Y. July 25, 2019): following *Rosenberg* and *Judicial Watch* rules "that the generic, across-the-board articulations of harm provided by the EPA as to a broad range of document types -- that '[r]elease of the withheld information would discourage open and frank discussion' and 'have a chilling effect on the Agency's decision-making processes,' does not sufficiently 'explain how a particular Exemption 5 withholding would harm the agency's deliberative process.'"

Natural Res. Def. Council v. EPA, No. 18-11227 (S.D.N.Y. Aug. 22, 2019): ruling deliberative process privilege protects evolving computer program; finding foreseeable harm where agency's extensive discussion illustrated how disclosure of the program would chill agency employees and prematurely disclose a continuing decision-making process in areas where the agency's final product did not incorporate all of its aspects.

Exemption 1

Osen LLC v. CENTCOM, 375 F. Supp. 3d 409 (S.D.N.Y. Mar. 22, 2019) (appeal pending): waiver; ruling CENTCOM may not withhold information concerning size of Explosively Formed Penetrators ("EFPs"), a particular type of improvised explosive device ("IED"), because it "has been previously disclosed to the public" in 40 other portions of the documents disclosed pursuant to this request, even though it was "merely the result of oversight"; also ruling CENTCOM may not withhold EFP strike photographs where one of its fellow DOD components has disclosed the same type of information.

Exemption 3

Everytown for Gun Safety Support Fund v. BATF, No. 18-2296, 2019 WL 3890220 (S.D.N.Y. Aug. 19, 2019): finding data from ATF's Firearms Tracing System database had to be disclosed, even though it had been protected by annual riders to appropriations bills from 2003-2012 which "limited the use of appropriated funds to disclose part or all of the contents of the Firearms Trace System database"; because the current rider has no reference to FOIA's Exemption 3, it doesn't satisfy the 2009 OPEN FOIA Act's requirement.

Exemption 4

Food Marketing Institute v. Argus Media Leader, 139 S. Ct. 2356 (2019): overruling "competitive harm" *National Parks* line of cases; holding "confidential" means "customarily and actually treated as private" or "secret" in the hands of the submitter; leaving unanswered whether the submitter must receive some explicit or implicit assurance of confidentiality from the government.

Pending Legislation

Open and Responsive Government Act of 2019, S.B. 2220, 116th Cong. (introduced July 23, 2019): amending Exemption 4 by defining "confidential" to mean "information that, if disclosed, would likely cause substantial harm to the competitive position of the person from whom the information was obtained"; amending Section 552(d) to prohibit "the withholding of a portion of an otherwise responsive record on the basis that the portion is non-responsive."

Exemption 5

Rojas v. FAA, 927 F.3d 1046 (9th Cir. 2019): 2-to-1 decision; intra agency; consultant corollary; ruling 9 pages of documents prepared by a consultant in response to agency's request in connection to litigation which the agency was engaged in not to satisfy Exemption 5's "intra-agency" threshold; rejecting consultant corollary along with 6th Cir., in contrast with seven other circuits (D.C., 1st, 2nd, 4th, 5th, 8th, and 10th) that have adopted it.

CREW v. GSA, 358 F. Supp. 3d 50 (D.D.C. 2019) (appeal pending): ruling deliberative process privilege inapplicable to "appraised values of the Hoover Building, and the value of offers it received for the property -- from a document titled 'Findings and Determination' that explained the agency's decision to cancel the swap-relocation project" because the two authors had "significant 'decision-making authority'"; it does not "reflect the personal opinions of the writer[s] rather than the policy of the agency," and "the document explains a decision already made rather than discuss[ing] one still in the works."

Cause of Action v. Dep't of Justice, 330 F. Supp. 3d 336 (D.D.C. 2018): attorney-client privilege inapplicable to email from Office of White House Counsel to OIP subject "FYI -- the administration has received several letters like the attached" concerning congressional chairman's letter to 10 agencies telling them to treat all communications between them as non-agency records; on *in camera* review court finds that there is no indication that the Office of Counsel is seeking legal advice and that while OIP sometimes provides legal advice, none was sought here; the subject of the Office of Counsel's email was not confidential because OIP referred to the chairman's letter which was public; finding deliberative process privilege inapplicable because although the communication was predecisional, it was not deliberative since it was factual and contained no recommendations.

Exemption 6

Civil Beat Law Ctr. v. CDC, 929 F.3d 1079 (9th Cir. 2019): finding CDC employees who conducted an investigation of "widespread regulatory noncompliance" regarding "biological agents and toxins" at the biological research laboratory at the University of Hawai'i had a privacy interest in their identities "because a nefarious person . . . could choose to focus on those CDC employees . . . for harassment or threats"; finding no public interest where there were no errors on the part of CDC employees, only state employees.

Exemption 7

ACLU v. Dep't of Educ., 320 F. Supp. 3d 270 (D. Mass. 2018): ruling documents concerning strategies for debt collection of student loans do not qualify under Exemption 7 (Exemption 7(E), in particular), because this is a contract matter and "[w]hen a borrower defaults on a student loan, he or she has not violated the law, and is not subject to criminal or civil sanctions."

Exemption 7(A)

Stein v. SEC, No. 15-1560, 2019 WL 689753 (D.D.C. Feb. 19, 2019): protecting documents in criminal and civil cases the disclosure of which could reasonably be expected to interfere with an ongoing law enforcement proceeding even though both cases are pending at the courts of appeal; "[b]ecause the potential for interference remains even when a case is on appeal, the SEC is permitted to withhold law enforcement records "until all reasonably foreseeable proceedings stemming from that investigation are closed."

Exemption 7(C)

Sikes v. Dep't of the Navy, 896 F.3d 1227 (11th Cir. 2018): where agency had disclosed Admiral Brooda's suicide note to his sailors in which he stated he "couldn't 'bear to bring dishonor' to his sailors based on accusations that he had worn two combat ribbons that he had not earned," ruling that there is a great privacy interest in [the] suicide note to his wife which "would intrude not only into the memory of a deceased loved one, but more specifically into the intimate and private relationship between Adm. Boorda and his wife. The note would reveal the deeply personal sentiments Adm. Boorda chose to share with his wife in the last moments of his life -- quite likely to be a window into his most sincere reflections on their relationship together"; finding "scant" assertions of public interest.

Higgs v. U.S. Park Police, No. 18-2816, 2019 WL 3798217 (7th Cir. Aug. 13, 2019): finding privacy interest in identities and information concerning witnesses, subjects of other investigations, and law enforcement personnel, even though, 20 years later "some of the affected people . . . may [be] dead" outweighs public interest in alleged agency misconduct in that requester had previously failed to show such misconduct in 2 collateral attacks on his conviction and, any "public education" in his vague statements concerning "the diligence of the [agency's] investigation and the DOJ's exercise of its prosecutorial discretion."