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ASAP'S 15TH ANNUAL NATIONAL TRAINING CONFERENCE

What's New in FOIA Case Law?

Procedural Issues

Amer. Ctr. for Law and Justice v. DHS, No. 21-1364, 2021 WL 5231939 (D.D.C. Nov. 10, 2021) -- noting that FOIA cases comprise almost one quarter of the entire D.C. District Court's docket, that "nonprofit [FOIA requesters] accounted for 56% of all FOIA lawsuits filed nationwide in 2018" and due to a FOIA fee preference for them and the generous attorney's fee provision, they are encouraged to submit "broadly worded requests," but ruling that plaintiff's broad, eight-part request seeking records that "in any way" relate to those topics which might be located in the files of any of DHS's 240,000 employees do not "reasonably describe records."

White v. Dep't. of Justice, No. 21-1229, 2021 WL 4931348 (7th Cir. Oct. 22, 2021) -- approving FBI's policy of processing 500 pages per month where requester sought 100,000 pages concerning white supremacy because the FBI's "finite resources must be reasonably apportioned among different requesters" and there was no basis for expedited processing.

Cause of Action Inst. v. OMB, No. 20-5006, 2021 WL 3699794 (D.C. Cir. Aug. 20, 2021) -- ruling OMB and USDA agency heads' browser histories were not "agency records" because, although the agencies possess them, they do not have control over them under the D.C. Circuit's four-part test: the agencies had no intent to retain control of them due to their 90- or 45-day retention defaults; they restricted other agency employees from monitoring those records and those employees did not "actually" view them; they "did not use the officials' browsing histories for any purpose, much less a purpose connected to agency decisionmaking"; nor were they "integrated into the agency's record system or files."

Exemption 1

ACLU v. CIA, No. 18-2268, 2022 WL 303280 (2nd Cir. Feb. 2, 2022) -- reversing district court which had ordered several factual portions of CIA's draft summary of the Office of Medical Service's participation in the agency's former detention and interrogation program, holding that the date and place of certain redacted intelligence activities "is so old now, there is no harm that could flow from this" since "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other

bits of information even when the individual piece is not of obvious importance in itself"; further reversing district court's disclosure order of how the CIA constructed its detention facilities because agency demonstrated *in camera* a "plausible and logical reason for redacting the information."

Exemption 3

Ctr. for Invest. Reporting, v. Dep't of Justice, No. 18-17356, 2021 WL 4314789 (9th Cir. Sept. 23, 2021) (2-to-1 decision) -- amending prior ruling and holding Exemption 3 does not protect data responsive to a query in ATF's Firearms Tracing System database, even though it had been protected by annual riders to appropriations bills from 2003-2012 which prohibited the use of appropriated funds to disclose part or all of the contents of the FTS database in response to a FOIA request because the 2010 and 2012 riders, the latter of which was intended to be permanent, have no reference to FOIA's Exemption 3, and thereby doesn't satisfy the 2009 OPEN FOIA Act's requirement; remanded to determine "whether the FTS database is currently capable of producing the information [the requester] seeks in response to a search query"; dissent argues that this provision of OPEN FOIA is an impermissible attempt by one Congress to bind a future one and therefore is in violation of the principle that if two statutes conflict, the latter one controls.

Everytown for Gun Safety Support Fund v. BATF, 984 F. 3d 30 (2nd Cir. 2020) -- ruling Exemption 3 protects data in ATF's Firearms Tracing System database, because riders to appropriations bills from 2003-2012 prohibited the use of appropriated funds to publicly disclose records; explaining that "[w]hen enacting subsequent legislation, Congress "remains free ... to exempt the current statute from the earlier statute [OPEN FOIA], to modify the earlier statute, or to apply the earlier statute but as modified."

Exemption 4

WP Co., v. SBA, No. 20-1240, 2021 WL 5881972 (D.D.C. Dec. 13, 2021) -- finding Exemption 4 applicable to loan status where "SBA has 'contact[ed] the top 300 PPP [Paycheck Protection Plan] lenders, seeking their position on whether PPP loan status information is customarily and actually kept confidential' and 'found no lender or trade association for lenders that stated a PPP lender discloses interim financial status of their SBA loans to the public.'"

Zirvi v. NIH, No. 20-7648, 2022 WL 1261591 (D. N.J. Apr. 28, 2022) -- after finding four grant applications all satisfy the *Food Marketing Institute* test, rejecting requester's argument that the records showed the submitter's unlawful monopolistic practices because there is no "crime-fraud" public interest exception to Exemption 4 since "once the district court concludes that the agency has established the applicability of the

exemption, its inquiry is at an end; the proponent of disclosure is not free to 'bolster the case for disclosure by claiming an additional public benefit.'"

Exemption 5

Rojas v. FAA, 989 F.3d 666 (9th Cir. 2021) (7-to-4 *en banc* decision), *cert. denied*, No. 21-133 (Jan. 10, 2022) -- ruling documents prepared by a consultant in response to agency's request in connection to litigation against the agency satisfies Exemption 5's "intra-agency" threshold; adopting consultant corollary along with seven other circuits (D.C., 1st, 2nd, 4th, 5th, 8th, and 10th) that have adopted it in contrast to the 6th circuit; observing that "[i]t seems doubtful that Congress intended the term "intra-agency" in Exemption 5 to exclude outside attorneys, because doing so would, for all practical purposes, preclude agencies from relying on the services of outside counsel in most instances."

Jobe v. NTSB, 1 F. 4th 396 (5th Cir. 2021) (2-to-1 decision), *cert. denied*, No. 21-469 (Jan. 10, 2022) -- approving the consultant corollary while recognizing that the issue is "a close question" holding that inter- or intra-agency threshold satisfied by documents submitted by aircraft leasing companies and manufacturers to NTSB in connection with air crash investigations because they "are non-adversarial fact-finding proceedings and that non-agency participants are overseen by the NTSB" and these consultants "are not 'self-interested' within the meaning of [the *Klamath*] decision; dissent would hold that a "communication between the regulator and the regulated -- between parties with conflicting public versus private interests -- is the very opposite of an internal government communication" and stating that "[i]f the terms 'inter-agency' and 'intra-agency exclude anything, I would think they exclude government communications with employees of the very entity the government is trying to regulate."

Am. Oversight v. DOT, No. 18-1272, 2022 WL 103306 (D.D.C. Jan. 11, 2022) -- agreeing with *Am. Oversight v. Dep't of Treasury*, No. 17-2078, 2020 WL 4201627 (D.D.C. July 22, 2020), and drawing sharp contrast with *Am. Oversight v. HHS*, 380 F. Supp. 3d 45 (D.D.C. 2019), by ruling that the "consultant corollary" of the inter- and intra-agency threshold requirement applies to communications between congressional staff and agency personnel which assist the agency to formulate its legislative proposals; finding that "the two staffs were 'working together' to achieve a common legislative purpose" and the "relationship is not the sort of 'interested party seeking a Government benefit at the expense of other applicants' that the *Klamath* court held vitiated Exemption 5 coverage."

Transgender Law Ctr. v. ICE, No. 20-17416, 2022 WL 1494722 (9th Cir. May 12, 2022) -- ruling that the district court erroneously treated all drafts as necessarily covered by the deliberative process privilege; without noting substantial conflicting authority, holding

that "the agencies [improperly] withheld draft press statements without adequately explaining how they reveal a deliberative process" and further observing that government "deliberations regarding how best to address public relations matters or possible responses to an inquiry received from an outside entity are not the type of policy decisions the privilege is intended to protect."

Reptrs. Comm. for Freedom of the Press v. FBI, 3 F. 4th 350 (D.C. Cir. 2021) -- distinguishing between different types of drafts by protecting emails discussing proposed changes to Director Comey's draft letter to the New York Times' editor, in which he defended the FBI's media impersonation policy because "[a]s the ground was shifting under the Bureau's feet, its leadership generated these pre-publication deliberations not so much to explain the agency's already-decided policy, but to figure out how to best promote and ensure the continuation of the FBI's policy in the face of intense congressional and public criticisms of the agency's preferred policy approach"; the "deliberative process privilege also applies to the pre-publication drafts of the Inspector General's report," but not to the "FBI's Factual Accuracy Comments . . . [which are] from the FBI to the Inspector General on the accuracy of purely factual statements in the draft report" because disclosure of these purely factual edits would not discourage candid discussion of policy matters within the agency.

Selgjekaj v. EOUSA, No. 20-2145, 2021 WL 3472437 (D.D.C. Aug. 6, 2021) -- holding the agency's entire criminal prosecution folder to be protected by the attorney work product privilege and, following *Reptrs. Comm. for Freedom of the Press v. FBI*, that "[t]he very context and purpose of" the withheld document "make the foreseeability of harm manifest" where the file was "prepared in contemplation of a complex financial fraud prosecution."

Exemption 6

Transgender Law Ctr. v. ICE, No. 20-17416, 2022 WL 1494722 (9th Cir. May 12, 2022) -- reversing district court which had permitted the agencies to use "Exemption 6 to shield email domains, for example, @ice.dhs.gov"; ruling that "email domains are not specific to particular individuals -- email domains are shared by all employees within a given DHS component -- so they do not satisfy the threshold test, and thus cannot be withheld per Exemption 6" and "this disclosure can be done without any identification of individuals."

Hammond v. DOD, No. 16-421, 2021 WL 6049886 (D.D.C. Dec. 21, 2021) -- in the context of an agency's FOIA/PA log, ruling that "[p]ersons who make requests under FOIA and the Privacy Act at Walter Reed surely have a personal privacy interest in information about the existence and location of their medical records, as well as when and how they chose to access those records," even though disclosure of their names

would not disclose the contents of those records; finding that "[a]lthough there may be some legitimate public interest in the volume of FOIA and Privacy Act requests being handled by a sub-component of the Department of Defense, there is no legitimate public interest in the names of the particular requesters in this context."

Exemption 7(C)

McWatters v. ATF, No. 20-1092, 2022 WL 990689 (D.D.C. Mar. 31, 2022) -- after ATF disclosed the first portion of a personal recording of a band taking the stage and being introduced at a 2003 rock concert in West Warwick, Rhode Island in which 100 people died in a fire, the court ruled that the agency could withhold the second portion of the tape which include shouts of "fire" and "sounds of panic, chaos, and eventually human suffering, including 'crying, screaming, and groaning," as well as the third portion of the tape in which there were no "audible human sounds" based on the privacy interests of the decedents' next of kin even though none of the decedents could be individually identified on the tape.

EPIC v. Dep't of Justice, No. 20-5364, 2021 WL 5571135 (D.C. Cir. Nov. 30, 2021) -- ruling campaign violations alleged against officials connected to the Trump campaign whose activities were made public by the agency's disclosure in the Mueller report under FOIA still have some privacy interest in these details, but the public interest tips in favor of disclosure where it "would . . . show how the Special Counsel interpreted the relevant law and applied it to already public facts in reaching his declination decisions"; further ruling that facts concerning whether these individuals may have made false statements has not previously been made public and thus their privacy interests outweigh the public interest.

Exemption 7(E)

Rptrs. Comm. for Freedom of the Press v. FBI, No. 17-1701, 2021 WL 2913078 (D.D.C. July 12, 2021) -- protecting redacted version of the FBI's policy guide on "Undercover Activities: Posing as a Member of the News Media or a Documentary Film Crew" because disclosure of remaining portions "could reasonably be expected to risk circumvention of the law" since potential wrongdoers could more easily violate the law or "past violators will escape legal consequences"; ruling FOIA Improvement Act's foreseeable harm test to be inapplicable because "Exemption 7(E)'s text "already contain[s] an explicit requirement that the agency show a reasonable nexus between the withheld information and a predicted harm."