

American Society of Access Professionals National Training Conference
“Updates from the Courts: Developments in FOIA Case Law”
June 2023 – New Orleans, Louisiana

* * *

PROCEDURAL ISSUES

Reasonable Description / Request Validity / “Unduly Burdensome” Processing

***Ctr. for Immigration Studies v. U.S. Citizenship & Immigration Servs.*, No. 22-0117, 2022 WL 4289561 (D.D.C. Sept. 16, 2022)** — granting the agency’s motion for summary judgment; holding that a request for all emails of three senior officials, which implicated over 1.6 million pages and would take nearly three years to process, “require[d] an unduly burdensome post-search effort,” not merely based on “some talismanic number of hours, months, or years” but because the agency would have “to process thousands of documents with no conceivable relation to the policies in which the [requester] proclaim[ed] an interest” in its request; opining further that “the juice is not worth the squeeze.”

***Anand v. Dep’t of Health & Human Servs.*, No. 21-1635, 2023 WL 3600140 (D.D.C. May 23, 2023), appeal filed, No. 23-5119 (D.C. Cir. May 31, 2023)** — granting the agency’s revised motion for summary judgment; holding that the Office of Inspector General properly refused to search for “all reports from Blue Cross Blue Shield corporation to OIG concerning improper prescribing of opiates by specific physicians” because such a search would take the component’s FOIA staff more than nine years to complete, which would have been “unduly burdensome” to execute.

***Judicial Watch, Inc. v. Dep’t of Health & Human Servs.*, No. 22-3153, 2023 WL 315588 (D.D.C. Jan. 19, 2023)** — denying the agency’s motion to dismiss; ruling that plaintiff’s request for various records pertaining to the COVID-19 vaccine was reasonably described and the agency did not sufficiently explain how a search would be unduly burdensome; nevertheless encouraging the parties “to work together” so plaintiff could narrow its “extraordinarily broad” request that would entail “unusually protracted agency review.”

Glomar Responses

***Schaerr v. Dep’t of Justice*, No. 21-5165, 2023 WL 3909471 (D.C. Cir. June 9, 2023)** — affirming the district court; concluding, based on circuit precedent, that an agency need not search for responsive records before invoking *Glomar* and refusing to confirm or deny the existence of records, as such information would itself be exempt under the FOIA; further holding that the agencies properly invoked *Glomar* in conjunction with Exemptions One and Three; rejecting the requester’s claims of “bad faith” in rebutting agency affidavits because those “allegations [are] either too generalized or too attenuated from the specific classification decisions at issue[.]”

Redirecting Requests

***Am. Civil Liberties Union v. Dep’t of Homeland Sec.*, No. 20-3204, 2023 WL 2733721 (D.D.C. Mar. 31, 2023)** — granting plaintiff’s motion for partial summary judgment; holding that plaintiff was not required to submit a separate request to the agency’s Office of Inspector General concerning

COVID-19 measures in immigration facilities because the agency’s departmental FOIA office should have forwarded the request to OIG based on the nature of the request or, at the very least, after clear leads developed during the search suggesting OIG likely maintained responsive records.

Policy-and-Practice Claims

***Am. Soc’y for the Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, 60 F.4th 16 (2d Cir. 2023)** — affirming dismissal of a policy-or-practice claim that alleged APHIS, as a result of its decommissioning of certain of proactively disclosed records, was regularly citing “exemptions that do not apply” and engaging in “unreasonable, inexcusable and unexplained delays” while adjudicating requests and appeals for the same records previously hosted on the databases; holding that, “even assuming that a ‘policy or practice’ claim is cognizable [in the Second Circuit], . . . such a claim . . . [fails] because [Congress] . . . reversed the alleged policy or practice . . . [by] direct[ing] the agencies to ‘restore’ each decommissioned database ‘and its contents’ to the status quo ante . . . [and to make those records] available ‘in their entirety without redactions except signatures’”; reasoning that, even if the D.C. Circuit’s decision in *Payne Enterprises, Inc. v. United States* were adopted, it would be inapt because the same “extraordinary set of circumstances” is not present here; notably, in a concurrence, Judge Menashi opined that the FOIA does not provide for a ‘policy or practice’ claim, and “[t]he proper avenue for challenging the policies and practice of agencies [vis-a-vis the FOIA] is the APA, 5 U.S.C. § 706.”

***Cause of Action Inst. v. Dep’t of Commerce*, No. 19-2698, 2022 WL 4130813 (D.D.C. Sept. 12, 2022)** — granting agency’s cross-motion for summary judgment; ruling that plaintiff had standing to bring a policy-and-practice challenge to the agency’s alleged unlawful withholding of Section 232 secretarial reports under Exemption 5; holding plaintiff’s policy-and-practice claim was ripe for review because it required neither “speculation about future application” nor consideration of “the facts of a particular case”; concluding plaintiff’s claim failed on the merits because reports required under 19 U.S.C. § 1862(b)—or at least the report requested by plaintiff—fall “within [the presidential-communications] privilege” as “a confidential report from a Cabinet Secretary to the President, created to advise him on matters of national security and ‘made in the process of shaping policies and making decisions.’”

Agency Control

***Behar v. Dep’t of Homeland Sec.*, 39 F.4th 81 (2d Cir. 2022), cert. denied No. 22-578 (U.S. May 1, 2023)** — reversing the district court and holding, in relevant part, that records obtained by the Secret Service from Donald Trump’s presidential campaign and transition team were not “agency records” under agency control because the Trump campaign and transition team both manifested a clear intent to retain control of the records, which were merely physically possessed by the agency, and both provided clear instructions limiting further distribution of the records.

***Cause of Action Inst. v. Nat’l Oceanic & Atmospheric Admin.*, No. 19-1927, 2023 WL 3619345 (D.D.C. May 24, 2023)** — granting requester’s cross-motion for summary judgment; holding that the agency’s search was inadequate because it too narrowly defined what constituted “agency records” of one of its regional Fishery Management Councils because it only searched for correspondences “submitted to the chair” or “specifically discussed or disseminated at a Council meeting”; noting that agency guidance purporting to define an “agency record” improperly relied on the Federal Records Act; ordering agency to conduct a supplemental search of non-federal employee council members’ and staff’s personal email accounts and devices.

Responsiveness Review

***NBC 7 San Diego v. Dep’t of Homeland Sec.*, No. 19-1146, 2022 WL 17820557 (D.D.C. Dec. 20, 2022)** — granting in part and denying in part the parties’ cross-motions for summary judgment; ruling that the agency and its components failed to provide sufficient explanation as to why they deemed requested records concerning a secret tracking database to be non-responsive because the agencies improperly considered the supposed “context” of the requests instead of identified search terms.

Record Creation

***Am. Civil Liberties Union Immigrants’ Rights Project v. Immigration & Customs Enf’t*, 58 F.4th 643 (2d Cir. 2023)** — reversing the district court and remanding for further proceedings; holding that the agency must substitute unique identifying numbers for FOIA-exempt alien identification numbers, thereby requiring the creation of new records; departing from contrary decisions issued by and within the Second, Third, Fifth, Sixth, Ninth, and D.C. Circuits.

Waiver of FOIA Rights

***Barnes v. Fed. Bureau of Investigation*, 35 F.4th 828 (D.C. Cir. 2022)** — affirming district court’s decision that the requester’s criminal plea bargain, which included a waiver provision that precluded him from seeking government records about his case, was valid because the government identified a legitimate criminal-justice interest in protecting the safety of a confidential informant.

Litigation Negotiation

***Nat’l Ass’n of Minority Veterans v. Dep’t of Veterans Affairs*, No. 21-1298, 2022 WL 17082841 (D.D.C. Nov. 18, 2022)** — denying the agency’s motion for summary judgment; holding that correspondence concerning the scope of plaintiff’s request that was exchanged between the parties after litigation had commenced was not an improper attempt by plaintiff to expand its FOIA request; rejecting the agency’s position as “overwhelmingly contracted” by evidence repeatedly submitted by both parties; directing the agency to justify withholdings made in the course of processing plaintiff’s modified request.

EXEMPTION 4

***Seife v. Food & Drug Admin.*, 43 F.4th 231 (2d Cir. 2022)** — affirming the district court’s decision that Exemption 4 protected portions of a pharmaceutical company’s successful application for accelerated approval of a drug; notably holding “the interests protected by Exemption 4 . . . are the commercial or financial interests of the submitter,” and the agency had satisfied the foreseeable-harm standard by addressing how disclosure would cause commercial or financial harm.

***Citizens for Responsibility & Ethics in Wash. v. Dep’t of Justice*, 58 F.4th 1255 (D.C. Cir. 2023)** — reversing the district court’s decision and remanding for further proceedings; holding that the Bureau of Prisons failed to establish that the names of companies supplying the federal government with a drug used for lethal injections qualified as “commercial” information under Exemption 4; further holding that the agency failed to show how certain “key contract terms” were “confidential” under Exemption 4.

EXEMPTION 5

Consultant Corollary / Exemption 5 “Threshold”

***Georgia v. Dep’t of Justice*, No. 21-3138, 2023 WL 2116375 (D.D.C. Feb. 20, 2023), appeal filed, No. 23-5083 (D.C. Cir. Apr. 24, 2023)** — granting plaintiff’s motion for summary judgment; holding that the agency had failed to establish how communications exchanged with private parties concerning joint election-related lawsuits against plaintiff qualified as “intra-agency” communications under the consultant corollary; holding further that, even if the communications at issue met the Exemption 5 threshold as “intra-agency” records, the agency could not rely on the deliberative-process and attorney work-product privileges because it failed to show it not shown a “sufficiently similar legal interest” with “private litigation groups” to invoke the common-interest doctrine.

***Am. Oversight v. Dep’t of Transp.*, No. 18-1272, 2022 WL 103306 (D.D.C. Jan. 11, 2022)** — granting the agency’s motion for summary judgment; ruling that the consultant corollary applies to communications exchanged between congressional staff and agency personnel that assisted the agency to formulate its own legislative proposals; noting that the Supreme Court’s holding in *Klamath Water Users* was “limited” and contrasting it with the instant case of congressional and agency staffs “‘working together’ to achieve a common legislative purpose” without “the sort of ‘interested party seeking a Government benefit at the expense of other applicants’” that would “vitiat[e] Exemption 5 coverage.”

Deliberative-Process Privilege

***Citizens for Responsibility & Ethics in Wash. v. Dep’t of Justice*, 45 F.4th 963 (D.C. Cir. 2022)** — affirming the district court’s decision; ruling that the agency failed to explain how a memo to Attorney General Barr concerning the Mueller Report fell under the deliberative-process privilege; declining to decide if “purely hypothetical, academic discussion among agency personnel could qualify [for withholding]”; refusing to allow the agency the chance to present a new argument that the memo at issue was drafted as part of “determining the content of a possible public statement regarding the report.”

***Transgender Law Ctr. v. Immigration & Customs Enf’t*, 46 F.4th 771 (9th Cir. 2022)** — amending earlier order; reversing the district court, which in relevant part erroneously treated all drafts at issue as necessarily covered by the deliberative-process privilege; remanding for further examination; noting that “the agencies withheld draft press statements without adequately explaining how they reveal a deliberative process” and observing that “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.”

***Nat’l Pub. Radio v. Dep’t of Homeland Sec.*, No. 20-2468, 2022 WL 4534730 (D.D.C. Sept. 28, 2022)** — granting requester’s motion for summary judgment; ruling that an agency consultant’s “recommendations concerning any allegations, findings, or best practices” at immigration detention facilities were pre-decisional, but some of the withheld information was factual and disclosable; specifically declining to adopt the agency’s argument that the consultant’s “unverified observations of first impression” were deliberative, and noting that such argument, “while creative, finds no support in extant FOIA jurisprudence”; further holding that “the FOIA Improvement Act does not allow agencies to show reasonably foreseeable harm simply by making boilerplate recitations about the potential for confusion to result from preliminary recommendations or findings.”

“Foreseeable Harm” Standard

***Rocky Mountain Wild, Inc. v. U.S. Forest Serv.*, 56 F.4th 913 (10th Cir. 2022)** — affirming the district court; holding that the requester waived any argument that the agency’s *Vaughn* Index was insufficient; holding further that the agency performed a reasonable search for voluminous records concerning proposed a highway project; ruling that the agency properly withheld records pursuant to Exemption 5 and demonstrated prospective harm, but explicitly declining to hold that the foreseeable harm provision imposed any sort of “heightened burden” on the agency; finally, concluding the district court had properly ordered plaintiff to return two documents that the agency accidentally disclosed to plaintiff without redaction, even though another organization subsequently posted the documents online.

EXEMPTION 6

***Transgender Law Ctr. v. Immigration & Customs Enf’t*, 46 F.4th 771 (9th Cir. 2022)** — amending earlier order; reversing the district court, which had in relevant part permitted the agencies to withhold “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” for “similar files” under Exemption 6, and “cannot be withheld” as “disclosure can be done without any identification of individuals”; reaching the same conclusion vis-à-vis the agency’s use of Exemption 7(C).

***Wash. Post Co. LLC v. Dep’t of Def.*, No. 21-1025, 2022 WL 4119769 (D.D.C. Sept. 9, 2022)** — holding that the agency could not use Exemption 6 to categorically withhold the names of retired, non-Senate confirmed service members who applied to work for foreign governments; holding further that the agency was required to disclose income and security clearance information of retired, Senate-confirmed foreign employment applicants; ruling that the Air Force properly relied on Exemption 7(C) to withhold names of military officers alleged to have violated federal law, but the Army and Navy improperly relied on attorney-client privilege to withhold factual portions of memos provided by non-agency personnel and failed to reasonably segregable factual content.

EXEMPTION 7(C)

***McWatters v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 20-1092, 2022 WL 3355798 (D.D.C. Aug. 15, 2022)** — amending earlier order; holding that the agency properly withheld portions of an audio recording of a concert at which 100 people died in a fire because disclosure of shouts of “fire” and “sounds of panic, chaos, and eventually human suffering” would infringe the privacy interests of decedents’ next-of-kin, even though no individual voices could be identified; noting the lack of any asserted public interest in disclosure; reserving consideration of whether segregable portions of the recording, “when no human voices are audible,” are disclosable; renewed cross-motions pending.

***BuzzFeed, Inc. v. Dep’t of Justice*, No. 21-5733, 2022 WL 2223124 (S.D.N.Y. June 21, 2022), appeal filed, No. 22-1812 (2d Cir. Aug. 18, 2022), argued (2d Cir. June 7, 2023)** — holding that the agency properly withheld the identity of a former Senior Executive Service employee found by the Inspector General to have engaged in sexual harassment and required subordinates to perform personal errands; ruling that two of five privacy factors favored disclosure (*viz.*, the employee’s rank and non-availability of information elsewhere), but that the degree of wrongdoing was not sufficiently serious and disclosure would not shed light on the performance of official responsibilities of the employee or agency.

EXEMPTION 7(E)

***Xanthopoulos v. Internal Revenue Serv.*, 35 F.4th 1135 (8th Cir. 2022)** — reversing district court’s decision that the IRS properly withheld portions of the Internal Revenue Manual concerning authentication of third-party representatives; holding that the agency’s single declaration erroneously characterized the IRS “solely as a law enforcement agency” and incorrectly stated that “the I.R.M. generally” is “compiled for law enforcement purposes”; consequently concluding that the district court’s denial of *in camera* inspection was “an abuse of discretion”; remanded for further proceedings.

EXEMPTION 8

***Leopold v. Dep’t of Justice*, No. 19-3192, 2022 WL 4299993 (D.D.C. Sept. 19, 2022), *appeal filed*, No. 22-5300 (D.C. Cir. Nov. 18, 2022)** — holding that the agency properly invoked Exemption 8 to withhold in full an independent monitor’s 1,000-page compliance report concerning HSBC; ruling that no non-exempt information could be reasonably segregated and released, including “background information or a table of contents.”