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FOIAXPRESS USER CONFERENCE & TECHNOLOGY SUMMIT

Recent Significant FOIA Decisions

Procedural Issues

CREW v. DOJ, 846 F.3d 1235 (D.C. Cir. 2017) -- reading room; denying CREW's action under the Administrative Procedure Act (APA) seeking to require the Office of Legal Counsel to post all of its past and future opinions in the Dep't of Justice's electronic reading room; to prevail under the APA there must be no other adequate remedy, and here the court finds that CREW must sue under the FOIA as an individual complainant seeking records, and if successful, that "question -- whether the reading-room provision commands disclosure of any OLC opinions -- awaits a different day and a different case."

Rocky Mountain Wild v. U.S. Forest Serv., No. 15-127, 2017 U.S. Dist. LEXIS 11533 (D. Col. Jan. 27, 2017) -- agency records; OPEN Government Act; ruling that where a contractor produced an Environmental Impact Statement for agency, but where no agency employee viewed contractor's EIS background records, those background records are not agency records; those records were not "not maintained for the purposes of records management" since "[t]he primary purpose of the contract was to prepare the EIS itself; document management was only one of many subsidiary tasks related to that purpose."

Buholtz v. USMS, No. 16-943, 2017 WL 160808 (D.D.C. Jan. 16, 2017) -- agency records; OPEN Government Act; ruling agency not required to obtain records concerning requester's incarceration from its contract detention facility; finding agency neither created and possessed, nor exercised control over these records and that they were not maintained by the contractor for "purpose of records management" because they were not put in the "custody of a third-party for storage."

Price v. DOJ, No. 15-5314 (D.C. Cir. Aug. 4, 2017) (2-1 decision) -- waiver of right to make FOIA requests; recognizing many rights may be waived by a defendant in a plea agreement, but holding "government has not pointed us to any legitimate criminal-justice interest served by allowing for FOIA waivers in plea agreements"; sharp dissent accuses majority of "craft[ing] a new guilty-plea-waiver standard" and, in any event, preserving law enforcement personnel resources should satisfy such a standard.

Shapiro v. CIA, No. 14-199, 2017 WL 1216505 (D.D.C. Mar. 31, 2017) -- "scoping"; finding FBI properly complied with *AILA* by determined that pages with responsive information, not the entire report, are within the scope; "[i]f an agency was forced to turn over a full manual or entire report every time a single page contained a responsive term, the amount of time, labor, and cost that would be required to review this purportedly

'responsive' material for exemptions would be exponential, hindering the agency's ability to process multiple requests efficiently or allocate its resources effectively."

Parker v. DOJ, No. 15-1070 (D.D.C. Aug. 16, 2017) -- "scoping"; observing that "[a]lthough there is no per se rule that letters and their attachments must be treated as one, the Court finds that these two pieces belong together" in this case; ruling that where the agency processed a letter in a file concerning discipline of an AUSA for specific misconduct not related to the misconduct that was the subject of the request, an attachment to that letter will also be treated as responsive.

Huntington v. Dep't of Commerce, No. 15-2249, 2017 WL 211301 (D.D.C. Jan. 18, 2017) -- ruling that agency has not shown that it conducted an adequate search because it "failed to invoke 'the 'magic words' concerning the adequacy of the search -- namely, the assertion that [it] searched all locations [not most locations] likely to contain responsive documents"; finding agency's statements that it "identified offices reasonably likely to have responsive information and those offices conducted a reasonable search for responsive records" to "come close, but they ultimately do not pass muster."

Liberman v. DOT, No. 15-1178, 2016 WL 7496722 (D.D.C. Dec. 31, 2016) -- ruling that blogger who contributes "several posts per month" to a blog that "averages 6,000 unique visitors per month" qualifies as a "representative of the media."

Nat' Sec. Counselors v. DOJ, 848 F.3d 467 (D.C. Cir. 2017) -- fee waiver; upholding denial of fee waiver where requester failed to show its ability to disseminate because its "website at the time of its FOIA requests . . . appeared to be 'no more than a clearing house for the records [it] received' through FOIA" and did "'not appear [to be] actively engaged in gathering information to produce' original publications, as '[t]he NSC Publications' section of [its] website contains only three publications, two of which were written prior to NSC's existence"; finding that the requester "produced no information about the size of its audience or the amount of traffic received by its website."

Chelmowski v. FCC, No. 16-5587, 2017 WL 736893 (N.D. Ill. Feb. 24, 2017) -- ruling that requester's letter to the Office of Government Information Service (OGIS), following the agency's adverse determination, did not relieve him of his obligation to exhaust his administrative remedies through the agency's administrative appeal process.

Exemption 1

Associated Press v. FBI, No. 16-1850 (D.D.C. Sep. 30, 2017) -- Ex. Order 13,526; protecting identity of, and price paid to, the IT company that hacked the iPhone of the two terrorists who murdered 16 people in San Bernardino; finding that this information could "reasonably be expected to cause serious damage to national security, as it would allow hostile entities to discover the current intelligence gathering methods used, as well

as the capabilities and limitations of those methods"; holding then-FBI Director Comey's congressional testimony that price "exceeded the salary[for] the remainder of his seven-year, four-month tenure, about $1.2 million," was not a waiver because it was too general.

Exemption 4

PETA v. HHS, No. 15-309, 2017 WL 59079 (D.D.C. Jan 5, 2017) -- on motion for relief of judgment, protecting information submitted by 2 previously non-objecting submitters based on showing that one hadn't received agency's submitter notice and the other didn't respond due to "clerical error, oversight or some similar mistake."

Exemption 5

Lucaj v. FBI, 852 F.3d 541 (6th Cir. 2017) -- inter- or intra-agency threshold; finding two DOJ Criminal Division records providing information to, and seeking information from, criminal authorities in Austria in connection with possible U.S. and/or foreign criminal prosecution of requester not to be intra-agency documents under either the "consultant corollary" or the "common interest doctrine"; recognizing that its holding is in conflict with decisions in four other circuit courts of appeal.

Nat'l Ass'n of Crim. Def. Lawyers v. DOJ, 829 F.3d 741 (D.C. Cir. 2016) (*amended opinion*) -- attorney work product privilege; protecting entire 500-plus page DOJ prosecutors' Federal Criminal Discovery Blue Book because a work product privilege record does not have to be prepared for an individual case; remanding to determine whether record contains any previously disclosed policy statements, which the agency concedes it has made, on the agency's criminal discovery obligations.

Exemption 6

Hunton & Williams, LLP v. U.S. Dep't of the Army, No. 15-1208, 2017 WL 1207410 (D.D.C. Mar. 31, 2017) -- ruling DOD policy that explains why lists of individual Army employees could be at risk of harassment is irrelevant to names of individual employees involved throughout a Clean Water Act adjudication; finding that even though the Army has identified these employees by title and as non-Senior Executive Service personnel, if "there is a privacy interest, it is likely small," particularly when weighed against the public interest in understanding how the Army functioned in this matter.

Exemption 7

Whitson v. U.S. Forest Serv., No. 16-1090 (D. Colo. Aug. 29, 2017) -- law enforcement threshold; ruling that investigation by Forest Service's Human Resources Management office which could result in specific employees being subject to civil or criminal sanctions for misconduct in connection with federal firearms laws and the Wild Free-Roaming Horses and Burros Act was compiled for law enforcement purposes.

Schwartz v. DOD, No. 15-7077, 2017 WL 78482 (E.D.N.Y. Jan. 6, 2017) -- surprisingly finding Office of Special Security's Power Point presentation for its personnel for "security procedures and need for operational security awareness" concerning "office building security measures for [its] civilian employees" was not compiled for law enforcement purposes; noting Exemption 7 "cannot be used by agencies as an end-run around established procedures for classification of material that poses a risk to national security."

Exemption 7(C)

Tuffly v. DHS, No. 16-15342 (9th Cir. Sept. 13, 2017) -- protecting names of 149 detainees released [due to fiscal uncertainty] pending final removal determinations; finding a significant invasion of privacy where "non-criminals and other low risk offenders" would be "publicly identified as unauthorized immigrants who had previously been held in . . . detention, a status which carries with it the potential for stigma, harassment, discrimination, illegal detention, and even violence" and their "names would be linked to other personal and potentially embarrassing information that has already been disclosed but not identified as applying to them"; finding this interest outweighs public interest "in evaluating the effects of the government's release decisions."

Exemption 7(E)

Levinthal v. FEC, No. 15-1624, 2016 WL 6902111 (D.D.C. Nov. 23, 2016) -- ruling that FEC is a law enforcement agency because it has "civil enforcement" obligations to "administer and enforce campaign finance laws" and its IT system is used in such enforcement efforts; finding disclosure of the FEC's IT vulnerabilities study would permit outsiders to "gain unlawful access to the Commission's technology systems, obtain and manipulate sensitive and confidential data about candidates, [and] officeholders."

Exemption 9

AquAlliance v. Bureau of Reclamation, 856 F.3d 101 (D.C. Cir. 2017) -- ruling that

"water-well depth and location" is protected as "geological and geophysical information and data, including maps, concerning wells."