SUMMARIES OF NEW DECISIONS

SUMMARIES OF NEW DECISIONS - JUNE 2011

As announced previously by OIP, we are now posting up-to-date summaries of new court decisions. To facilitate their review, the cases are broken down by FOIA Exemption or procedural element and internal citations and quotations have been omitted. OIP provides these cases summaries as a public service; due to their nature as summaries, they are not intended to be authoritative or complete statements of the facts or holdings of any of the cases summarized, and they should not be relied upon as such.

WEEK OF MAY 30 – JUNE 3

Courts of Appeal
1. McKinley v. Bd. of Gvn'rs of the Fed. Reserve Sys., No. 10-5353, 2011 WL 2162896 (D.C. Cir. June 3, 2011) (Henderson, J.)

Re: Request for records pertaining to Board's decision to authorize the Federal Reserve Bank of New York (FRBNY) to provide a temporary loan to Bear Stearns through an extension of credit to JP Morgan Chase; at issue, plaintiff appeals district court's decision to grant summary judgment to the Board, specifically, with respect to records withheld pursuant to Exemption 5

Holding: Affirming the district court's grant of summary judgment to the Board based on its finding that the Board's withholdings pursuant to Exemption 5 were appropriate

• Standard of review: The D.C. Circuit reviews the "district court's grant of summary judgment de novo."

• Exemption 5 (threshold/consultant corollary): The D.C. Circuit holds that communications exchanged between the Board and the FRBNY qualify as intra-agency memoranda under Exemption 5. The D.C. Circuit rejects plaintiff's argument that "the Board failed to demonstrate that the FRBNY's interest is identical to that of the Board" as required by the Supreme Court in *Klamath*. Rather, the D.C. Circuit finds that "[u]nlike the Indian tribes [in *Klamath*] the FRBNY '[did] not represent an interest of its own, or the interest of any other client, when it advise[d] the [Board]' on the Bear Stearns loan." Noting that the Federal Reserve System requires "the Board and Reserve Banks [to] work together" to achieve certain national economic goals, the D.C. Circuit concludes by finding "[t]hat the Congress requires both the Board and the relevant Reserve Bank (here, FRBNY) separately to determine that the loan made to Bear Stearns through JP Morgan promotes the maintenance of a sound and orderly financial system does not mean that the Board's and the FRBNY's interests diverged in deciding to make the loan."

The D.C. Circuit also dismisses plaintiff's claim that "the Board failed to show it solicited the withheld material from the FRBNY as [D.C. Circuit] precedent requires." To the contrary, the D.C. Circuit finds that the Board's declaration "adequately demonstrates that the Board solicited the material from the FRBNY." The D.C. Circuit highlights the economic climate against which the Board acted, noting that the Board "found itself reacting to what it believed to be an emergency, as evidenced by its decision 'to provide temporary *emergency* financing to Bear Stearns.'" In order to assess the real-time exposure of large complex banking organizations (LCBOs) to a Bear Stearns failure, the Board turned to FRBNY which is tasked with "monitoring of LCBOs and advising the Board of their financial condition." As such, the D.C. Circuit concludes that "to aid in its deliberative process, the Board sought information from the FRBNY about the financial condition and exposures of institutions monitored by the FRBNY" and that "[t]he FRBNY did not simply provide the information, unprompted, to the Board."

• Exemption 5 (deliberative process privilege): The D.C. Circuit determines that the Board properly invoked the deliberative process privilege to protect certain memoranda. The D.C. Circuit rejects plaintiff's claim that a "record is 'deliberative' only if its disclosure would harm the agency's decisionmaking process." Instead, the D.C. Circuit finds that "Congress enacted FOIA Exemption 5 . . . precisely because it determined that disclosure of material that is both predecisional and deliberative *does* harm an agency's decisionmaking process." Moreover, the D.C. Circuit notes that "[i]t would be impossible for courts to administer a rule of law to the effect that some but not all information about the decisional process may be disclosed without violating Exemption 5." Additionally, here, the D.C. Circuit concludes that "the Board has demonstrated that disclosure of the withheld material would 'discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions" because it "'would impair the Board's ability to obtain necessary information in the future[ ] and could chill the free flow of information between the [supervised] institutions and the Board and Reserve Bank[s].'"

• Exemption 5 (attorney work product privilege): The D.C. Circuit holds that the Board properly asserted the attorney work product privilege to protect one document that "'was prepared by FRBNY attorneys in anticipation of litigation by Bear Stearns shareholders related to the Board's authorization to extend credit to [Bear Stearns] indirectly through [JP Morgan]." Because the D.C. Circuit has already "concluded that the FRBNY did indeed act as a consultant to the Board," it rejects plaintiff's argument against the application of the attorney work product privilege premised upon his position that "FRBNY does not come within the consultant corollary." Moreover, the D.C. Circuit finds that "[t]he FRBNY, acting as the Board's consultant, prepared the withheld document for the Board in anticipation of litigation."

2. Campbell v. SSA, No. 10-2255, 2011 U.S. App. LEXIS 11267 (3d Cir. June 3, 2011) (per curiam)

Re: Request for records related to plaintiff's application for Social Security disability benefits

Holding: Affirming district court's grant of summary judgment to SSA based on finding that plaintiff's FOIA claim was moot

• Litigation considerations: As an initial matter, the Third Circuit finds that plaintiff's "contentions on appeal that the District Court wrongly concluded that he had abandoned his FOIA claim in [his] Third Amended Complaint . . . do not provide a basis for upsetting summary judgment in favor of the SSA." The Circuit notes that "[w]hether or not the District Court thought it likely that the claim had been abandoned, the court fully analyzed [plaintiff's] FOIA claim on the merits in reaching its mootness determination" and "[a]ny error was thus harmless."

• Adequacy of search: The Third Circuit concludes that "[t]he affidavits submitted with the SSA's motion for summary judgment demonstrate that the agency's search was reasonable, just as the District Court concluded." The Circuit finds that none of the exhibits submitted by plaintiff "support[ ] his contention that the SSA withheld documents from him." Moreover, the absence of certain documents in his file "do[ ] not establish, for purposes of defeating a summary judgment motion, that the SSA's search was not reasonable or that any documents were improperly withheld."

District Courts

1. The Ctr. for Medicare Advocacy, Inc. v. HHS, No. 10-645, 2011 WL 2119226 (D. Conn. May 26, 2011) (Kravitz, J.)

Re: Request for records pertaining to the "improvement standard" allegedly used by HHS and by insurers with which HHS contracts in order to deny or terminate Medicare coverage

Holding: Concluding that HHS conducted a reasonable search for records and properly excluded from its search records that were not created or under the control of the agency

• Adequacy of search/agency records: The court concludes that HHS is not required to search the records of contractors that administer Medicare Advantage Plans under Medicare Part C in response to a FOIA request. Citing the Supreme Court's decision in *Tax Analysts* for the proposition that "materials only qualify as 'agency records' if they *both* were obtained or created by the agency *and* are under the control of the agency," the Court determines that HHS's regulations providing that "'contractor records are not subject to FOIA unless they are in the possession or under the control of HHS or its agents'" underscores that "even when contractor records were originally created or obtained by HHS, those records are not 'agency records' for FOIA purposes unless they remain in the possession or under the control of HHS." The court notes that, in accordance with agency regulations promulgated in 1987, contractors administering Medicare Part A and Part B "are treated as part of HHS for FOIA purposes." The court notes, however, that "there is no regulation that defines Medicare Part C contractors as part of HHS for FOIA purposes." The court finds that "[i]t is clear that the Medicare Advantage Plan records sought by [plaintiff] were not created or obtained by HHS and are not in the control of HHS." Moreover, plaintiff "does not allege that the information it seeks from the Medicare Part C contractors came into HHS's possession at any point – let alone 'in the legitimate conduct of [HHS's] official duties.'"

The court further notes that although the Second Circuit has not adopted the D.C. Circuit's holding in *Burka v. HHS* concluding that "it is possible for an agency to *constructively* obtain and control records for FOIA purposes," even under that standard, plaintiff would not prevail. The court finds that under that standard "the documents held by the Part C contractors would not be deemed 'agency records,' since there is no allegation that the agency exercised 'extensive supervision and control' over the production of the records . . . and [plaintiff] has offered no evidence that the Part C contractors intended to relinquish control over the records to HHS, that HHS had the ability to use and dispose of the records as it saw fit, that HHS personnel read or relied on the records, or that the records were in any way integrated into HHS's record system or files." The court also rejects plaintiff's arguments that "Part A, Part B, and Part C contractors are all 'state actors' for the purposes of Medicare, that any of those contractors' training materials with regard to the improvement standard are thus 'agency records,' and that '[t]he Court should not accord any credit to HHS['s] failure to update its regulation [to include Part C plans].'" For one, the court concludes that, despite the fact that HHS defined Part A and Part B providers as subject to the FOIA in its 1987 regulation, "[n]othing indicates that the regulation codified a general principle that any private entity that contracts with an agency to administer the agency's programs is part of the agency for purposes of the FOIA." The court notes that "HHS is free to interpret the FOIA's definition of 'agency' to mean that Part C plans are included within HHS for FOIA purposes" "[b]ut [it] has not done so." Moreover, although Part C was enacted after the 1987 regulations were promulgated, the court "sees no reason why the agency would not have amended the 1987 regulation if it believed that Part C contractors should be treated like Part A and Part B contractors for FOIA purposes." With respect to plaintiff's "state actors" claim, the court "rejects [plaintiff's] attempt to graft the Fourteenth Amendment's 'state action' requirement onto the standard for determining whether a document is an 'agency record' under FOIA."

WEEK OF JUNE 6

Courts of Appeal

1. Prudential Locations LLC v. HUD, No. 09-16995, 2011 WL 2276206 (9th Cir. June 9, 2011) (Berzon, J.)

Re: Request for records pertaining to individuals who reported to HUD their suspicions that plaintiff, a real estate company, was violating the law; at issue are the identities of two complainants, one of whom requested anonymity

Holding: Vacating the district court's grant of summary judgment to HUD and remanding the matter for further proceedings

• Standard of review: The Ninth Circuit reviews "under a *de novo* standard whether an adequate factual basis exists to support the district court's decision." "If the district court did not have an adequate factual basis, [the Ninth Circuit] remand[s]." "'If an adequate factual basis exists, then the district court's conclusions of fact are reviewed for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed *de novo*.'"

• Exemption 6: As a threshold matter, the Ninth Circuit notes that plaintiff does not dispute that the documents at issue qualify as "similar files" under Exemption 6 and further comments that it "express[es] no view on that question and assume[s] without deciding that the documents qualify." The Ninth Circuit then evaluates whether disclosure of the identities of the two individuals who reported the suspected violations of the law to HUD regarding plaintiff "'would constitute a clearly unwarranted invasion of personal privacy.'" In terms of privacy interests, the Ninth Circuit explains that "[t]he government . . . is not required to establish that a privacy invasion is *certain* to occur," but "[r]ather, it is enough to show a 'substantial probability that the disclosure will lead to' an invasion of privacy." The Ninth Circuit further opines that "[t]he marked difference in the statutory text [between] . . . exemptions [6 and 7(C)] indicates that our 'substantial probability' gloss on Exemption 6 requires a significantly higher showing that an invasion will occur than the 'could reasonably be expected' standard found in Exemption 7(C)."

The Ninth Circuit suggests various privacy interests that the complainants may have in the disclosure of their identities. The Ninth Circuit acknowledges that "if the complainants are or were employed by [plaintiff], or even if they worked in non-managerial positions in the same industry as [plaintiff], there might well be a substantial probability that disclosure would lead to an invasion of personal privacy — namely, revealing their whistle-blower status could result in stigmatization, harassment, or retaliation." However, the Ninth Circuit also finds that "releasing the informants' identifying information might not threaten *any* nontrivial invasion of personal privacy." For example, the Ninth Circuit states that it "fail[s] to see . . . how disclosing the names of managerial employees at an industry competitor of [plaintiff] would infringe personal privacy interests in any nontrivial way," "because such complaints would have been made primarily for business reasons, any plausible *personal* privacy interests would be nonexistent or seriously diminished."

Similarly, the Ninth Circuit finds that while "complainants entirely unaffiliated with [plaintiff] or the real estate industry might have *some* nontrivial privacy interest in not being associated with the investigation, . . . it is doubtful on these facts that any such interest would mirror the ordinary concerns accompanying law enforcement investigations, such as fear of retaliation or harassment." Moreover, the Ninth Circuit observes that "[a]t a minimum, a cognizable privacy interest would need to be identified, and could then, if weak, be discounted in the balancing test." The Ninth Circuit further notes that it is possible that "any risk to personal privacy, if one could be identified, would be no 'more palpable than [a] mere possibilit[y]' . . . and so insufficient to justify the redactions no matter the public interest." Lastly, the Ninth Circuit comments that the complainant might be a public official, who maintains diminished privacy rights and "that fact, if true, would be quite pertinent to the weight accorded personal privacy interests in the Exemption 6 balancing test."

For the complainant who requested anonymity, the Ninth Circuit finds that such a request could "suggest[ ] he feared some adverse consequences could ensue from revealing his identity." Nonetheless, the Ninth Circuit concludes that "absent more information, [it is] required to speculate about the likelihood that a nontrivial interest is at stake with regard to either complainant, something [the Ninth Circuit] is not permitted to do at the procedural stage." Accordingly, the Ninth Circuit vacates the grant of summary judgment to HUD and remands the matter "to allow the parties to develop an adequate factual basis for the district court to determine whether the information at stake may be withheld pursuant to Exemption 6."

• Exemptions 7(C) & 7(D): The Ninth Circuit acknowledges "HUD's worry that releasing the names of persons who report suspected illegal activity will have a chilling effect on the ability of agencies to

investigate legal violations." Although HUD admits that Exemption 7(D) is not applicable in the instant case, the Ninth Circuit observes that "if HUD is worried about not discouraging future complainants, it might consider implementing confidentiality procedures that satisfy the Exemption 7(D) dictates." The Ninth Circuit also notes that invoking Exemption 7(C) might be appropriate given that the "exemption requires less from the government to justify withholding information than Exemption 6, both in terms of the likelihood that an invasion will result and in determining whether such an invasion would be 'unwarranted.'"

District Courts

1. McKinley v. Fed. Housing Fin. Agency, No. 10-1165, 2011 WL 2198577 (D.D.C. June 7, 2011) (Kennedy, J.)

Re: Request for records pertaining to the assessment of an adverse impact on systemic risk in addressing Fannie Mae and Freddie Mac, and in particular how the Federal Housing Finance Agency (FHFA) and the Department of the Treasury determined that conservatorship was the preferred option to avoid any systemic risk of placing those enterprises into conservatorship; at issue are two documents for which FHFA invoked the deliberative process and attorney work-product privileges

Holding: Concluding that FHFA properly asserted the deliberative process privilege to withhold deliberative portions of two documents; ordering FHFA to produce those documents in camera so that the court may evaluate the applicability of the attorney work-product privilege; and holding in abeyance the parties' motions for summary judgment

• Exemption 5 (deliberative process privilege): At the outset, the court notes that "it is undisputed that the two documents are predecisional," and that the parties only dispute whether they are deliberative. The court dismisses plaintiff's claim that "a document is not deliberative unless the agency can show that the release of the document would harm the agency's decisionmaking process." Rather, the court comments that the D.C. Circuit recently rejected plaintiff's argument on this issue in its ruling in a separate FOIA case, finding that "'Congress enacted FOIA Exemption 5 . . . precisely because it determined that disclosure of material that is both predecisional and deliberative *does* harm an agency's decisionmaking process.'" The court finds that "under the standard clarified and applied by the D.C. Circuit in *McKinley* [*v. Board of Governors of the Federal Reserve System*], [the documents at issue] are deliberative: they are internal documents that were 'provided to . . . senior policymakers to assist in their deliberations' regarding FHFA's oversight of the Enterprises" and notes that plaintiff "does not contend otherwise." The court notes that "'[t]he deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." Here, though because FHFA has claimed the attorney work- product privilege in addition to the deliberative process privilege, and given that the privilege does not require segregation, "to determine whether FHFA has properly withheld the entirety of both documents, the Court must determine whether they are protected work product."

• Exemption 5 (attorney work-product privilege)/in camera review: The court finds that "the essential question here is whether these records were prepared in anticipation of litigation." Despite plaintiff's argument to the contrary, the court agrees with FHFA that the fact the records at issue serve dual policy and litigation purposes "does not automatically preclude [them] from passing the anticipation-of-litigation test." The court finds that "[w]here a document has a non-litigation component, the key question is whether it 'would have been created in essentially similar form irrespective of the litigation.'" Here, the court concludes that "FHFA's affidavits are insufficient to establish that the documents would have been created in essentially similar form irrespective of the litigation." Therefore, the court "order[s] the FHFA to produce the two documents for in camera inspection."

2. Pickard v. DOJ, No. 10-5253, 2011 WL 2199297 (N.D. Cal. June 7, 2011) (Beeler, Mag.)

Re: Request for records pertaining to plaintiff and regarding the implementation and use of the DEA Agent's Manual with respect to risk assessment factors for confidential informants

Holding: Granting government's motion to transfer the case based on improper venue; and denying plaintiff's request for leave to amend his complaint without prejudice with leave to seek to amend in the district court to which the action was transferred

• Venue: The court grants defendant's "motion to transfer based on improper venue." The court notes that the "FOIA and the Privacy Act provide for venue in any of the following districts: (1) the district where the plaintiff resides or has his principal place of business; (2) the district where the records at issue are located; or (3) the District of Columbia." The court finds that for FOIA purposes, plaintiff who is a federal prisoner, "resides where he is incarcerated." Accordingly, the court concludes that "venue is appropriate in the District of Arizona (where Plaintiff resides), the Eastern District of Virginia (where the records are), or the District of Columbia." "Given that the records are in the Eastern District of Virginia, . . . the court transfers the case there."

• Litigation considerations/amending the complaint: "Given the court's ruling that venue is not proper here, the court denies [plaintiff] leave to amend without prejudice to his seeking leave in the Eastern District of Virginia."

3. Margolin v. NASA, No. 09-421, 2011 U.S. Dist. LEXIS 59651 (D. Nev. June 3, 2011) (Hicks, J.)

Re: Request for records pertaining to plaintiff's claim regarding patent infringement

Holding: Deferring plaintiff's motion for litigation costs pending submission of additional information showing costs incurred prior to supplemental release by agency; and denying plaintiff's request for litigation costs related to court's summary judgment ruling because plaintiff did not substantially prevail in that context

• Litigation costs: The court concludes, "to the extent [that plaintiff] seeks costs based on the court's summary judgment ruling, . . [he] did not substantially prevail." The court upheld NASA's determinations with respect to "virtually every document." "The fact that the court ordered release [of one, ultimately, non-responsive document] does not alter this conclusion." The court finds that "even though [plaintiff] obtained an order partially in his favor, the relief he obtained was nominal and had little relation to the relief he sought through this lawsuit – namely, the disclosure of documents related to his administrative claim for patent infringement." Additionally, even if plaintiff were eligible for costs, the court determines that he is not entitled to such relief because "disclosure of the document provides little, if any, public benefit, [because] the document was non-responsive to [plaintiff's] FOIA request and lawsuit, and in retrospect the government had a reasonable and legitimate basis for withholding [it]."

However, the court finds that plaintiff is eligible for some litigation costs as a result of supplemental releases made by NASA in litigation. The court finds that plaintiff "did substantially prevail to the extent that the filing of this lawsuit prompted a voluntary or unilateral change in position by the agency." The court notes that "[i] f not for [plaintiff's] lawsuit, NASA would have rested upon its final decision denying [plaintiff's] administrative appeal of the agency's initial FOIA response." Moreover, "[t]he court further finds that [plaintiff] is entitled to at least some portion of costs incurred prior to November 5, 2009, when NASA made its supplemental disclosures." In terms of the entitlement factors, the court finds that although "[t]he public benefit from disclosure may be small," plaintiff "seems to have had little, if any, commercial benefit resulting from disclosure." Instead, plaintiff's interest "was predominantly personal, and that interest was substantial." Lastly, the court notes that "NASA's initial withholding of the records it later voluntarily disclosed was not based on any asserted reasonable basis in law," but rather its "failure to conduct a

thorough search for records responsive to [plaintiff's] request." The court rules that plaintiff "is not entitled to costs of litigation after November 5, 2009, when NASA made its supplemental disclosures."

WEEK OF JUNE 13

District Courts

1. Families for Freedom v. U.S. Customs & Border Protect., No. 10-2705, 2011 U.S. Dist. LEXIS 63829 (S.D.N.Y. June 16, 2011) (Scheindlin, J.)

Re: Requests for records pertaining to the scope and practices of U.S. Customs and Border Patrol's (CBP's) operation on inter-city buses and trains within the geographic area known as the "Buffalo Sector"

Holding: Granting, in part, defendants' motion for summary judgment as to withholdings under Exemption 5; and granting, in part, plaintiffs' motion for summary judgment with respect to material withheld under Exemptions 6, 7(C), and 7(E)

• Exemption 7(E): Defendants initially withheld certain records pursuant to Exemption 2 as well as Exemption 7(E). After the Supreme Court's decision in *Milner v. Department of Navy*, the defendants advised the court that its "analysis is little altered, as defendants claimed Exemptions 7(E) and High 2 concurrently to those documents." Accordingly, the court "address[ed] only the applicability of Exemption 7 (E) to the contested documents." The court concludes that defendants must release the total number of all arrests made each year by the Rochester Station and the number of transportation raid arrests within the Buffalo Sector. "Such statistics are neither 'techniques or procedures' nor 'guidelines,' such that they could be properly exempt under 7(E)." While the court notes that it "need not reach whether the disclosure of such information risks circumvention of the law," it finds, in any event, such a risk is not present here because "[p]laintiffs are not requesting arrest statistics for each station within the Buffalo sector, which could theoretically aid circumvention of the law by publicizing the relative activity or success of Border Patrol agents in affecting apprehensions at *each station*, as defendants fear." Moreover, the court concludes that "[t]o the extent that the Daily Reports include arrest data broken down by station, defendants may redact the information so that only the Rochester Station arrest data and Buffalo Sector arrest totals are disclosed." Additionally, the court requires defendants to segregate any nonexempt information from the comments section of the reports. The court notes that "[g]iven the nature of the Buffalo Sector Daily Reports, [it] would expect the vast majority of information contained therein to be retrospective, and therefore not to constitute 'guidelines' under FOIA."

The court also concludes that defendants may not use Exemption 7(E) to withhold "charge codes" from certain sample arrest forms, which "'indicate the legal reason an individual was arrested for violation of immigration laws.'" The court finds that although the arrest forms "constitute 'records or information compiled for law enforcement purposes," the release of the charge codes contained therein would not 'disclose techniques or procedures for law enforcement investigations or prosecutions, or . . . guidelines for law enforcement investigations or prosecutions.'" Moreover, the court notes that "[g]iven that defendants have already released [the catalogue of available charge codes], it is difficult to imagine how the codes cited on particular sample [arrest] forms will compromise the security of agency databases or otherwise risk circumvention of the law."

• Exemption 5 (attorney client privilege): The court holds that defendants properly asserted the attorney client privilege to withhold certain training memoranda that "were created by attorneys in CBP's Office of Assistant Chief Counsel and contain legal analysis and guidance to Border Patrol agents regarding the use of race or ethnicity in executing their duties, and analysis of case law concerning racial profiling in law enforcement." The court finds that the memoranda "fall squarely within the attorney client privilege" because they "were 'created by agency attorneys for the purpose of imparting legal advice to employees of the agency,' and consist of legal analysis and guidance." The court rejects plaintiffs' suggestion that the

"'agency [should] not be permitted to develop a body of secret law used by it in the discharge of its regulatory duties and in its dealings with the public'" and that the memos should be released "'[g]iven the public's interest in establishing that, in fact, racial profiling is not used [ ] in the course of CBP's transportation checks.'" Contrary to plaintiffs' assertions, the court find that plaintiffs' claims "do[ ] not come close to establishing the existence of a body of 'secret law,' particularly because plaintiffs also concede that the memoranda may describe how CBP officer's should *avoid* using racial profiling, which would be in accordance with the agency's public position." Additionally, the court dismisses plaintiffs' argument that defendants waived their ability to assert Exemption 5 for the documents by disclosing other memoranda concerning the same general subject matter. The court declines to address plaintiffs' arguments regarding defendants' assertion as to the attorney work product privilege because it finds that memoranda were properly withheld pursuant to the attorney client privilege.

• Exemption 7/threshold: At the outset, the court notes that "[w]hile ICE is unquestionably a federal law enforcement agency, not every document produced by ICE personnel has been 'compiled for law enforcement purposes' under FOIA." With regard to portions of two agency documents for which defendants asserted Exemption 7(C), the court finds that the documents "are not investigatory files," but rather, "are directives regarding the general execution of tasks by agency personnel." The court comments that "[w]hile in a general sense, the tasks described in the two documents pertain to law enforcement, the documents are not investigatory, and thus, were not 'compiled for law enforcement purposes.'" Accordingly, the court holds that defendants may not use Exemption 7(C) to protect "the names of agency personnel who authored or received the two documents."

• Exemption 6/threshold: In addition to concluding that the two documents containing agency directives do not qualify for the threshold of Exemption 7(C), the court determines that these documents "are nothing like a medical or personnel file" as covered by Exemption 6. They "are not documents 'on an individual'" and "[n]either document contains any personal or identifying information apart from the names of the authors, recipients, and persons identified as the 'the [SCOs].'" As such, the court concludes that "the documents cannot be withheld under Exemption 6, because they do not constitute 'similar files.'"

• Exemptions 6 & 7(C): To the extent these documents qualified under the threshold of Exemptions 6 or 7 (C), the court adds that under either standard "the public interest in disclosure outweighs the privacy interest" because "there is a substantial interest in knowing whether the expectations and requirements articulated in the memoranda reflect high-level agency policy." The court finds that disclosure of the names of the agency employees alone "in conjunction with the already disclosed content of the memoranda, will help to inform the public as to 'what their government is up to.'"

• Waiver: The court notes that certain information has already been disclosed in response to this FOIA request, such as the names of certain databases, "thereby waiving defendants' right to claim exemption for that information." The court finds, though, that "[w]hile the agency has chosen to release certain information in the past, that does not mean that it must release other similar information."

2. Gianello v. Port Authority of NY & NJ, No. 11-3829, 2011 U.S. Dist. LEXIS 64233 (S.D.N.Y. June 16, 2011) (Koeltl, J.)

Re: Request for records from the Port Authority of New York and New Jersey

Holding: Dismissing plaintiff's complaint

• Proper party defendant: The court dismisses the complaint because plaintiff failed to name a federal agency defendant. The court notes that "[t]he Port Authority is a bi-state entity created by compact between the States of New York and New Jersey." Accordingly, "[a]s the defendant is not a federal entity, the plaintiff cannot state a FOIA claim against it."

3. Rojas-Vega v. Cejka, No. 09-2489, 2011 WL 2417130 (S.D. Cal. June 10, 2011) (Benitez, J.)

Re: Request for tapes and transcripts sought in plaintiff's state plea proceedings

Holding: Dismissing plaintiff's third amended complaint without leave to amend for failing to state a claim upon which relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)

• Litigation considerations/amending the complaint: As an initial matter, the court notes that "[a] complaint filed by any person proceeding, or seeking to proceed, [in *forma pauperis*] under 28 U.S.C. § 1915(a) is subject to mandatory *sua sponte* review and dismissal if the complaint is frivolous or malicious, fails to state a claim upon which relief may granted, or seeks monetary relief from a defendant immune from suit." In accordance with this review, the court dismisses plaintiff's third amended complaint without leave to amend. The court concludes that in terms of plaintiff's FOIA claim his "conclusory allegations that an agency improperly withheld tapes and transcripts of state court proceedings is not sufficient." The court notes that "[f]ederal agencies are not caretakers of state court documents" and finds that "[p]laintiff provides no basis for an agency to maintain tapes and transcripts of Plaintiff's state court plea proceedings decades after those proceedings took place and years after the state court destroyed those records."

WEEK OF JUNE 20

Courts of Appeal

1. Kemmerly v. Dep't of Interior, No. 10-31117, 2011 WL 2473664 (5th Cir. June 22, 2011) (per curiam)

Re: Requests for which plaintiff failed to pay the assessed fees

Holding: Affirming district court's decision granting the Department of the Interior's (DOI's) motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies; and remanding with instructions that the district court modify its judgment to dismiss these claims without prejudice

• Exhaustion of administrative remedies: The Fifth Circuit affirms the decision of the district court granting defendant's motion to dismiss for lack of subject matter jurisdiction based on plaintiff's failure pay fees which is necessary to exhaust administrative remedies. The Fifth Circuit rejects plaintiff's claim that he constructively exhausted his administrative remedies "because the DOI's responses and estimates were 'not prepared in compliance with law' and were either untimely or arbitrary, capricious, excessive, and unreasonable." To the contrary, the Fifth Circuit notes that "DOI responded by providing [plaintiff] with a cost estimate and the opportunity to revise his requests" and further observes that, in fact, "DOI revised its cost estimate when [plaintiff] filed an affidavit identifying the documents he requested more specifically." Additionally, plaintiff "offers no support for his suggestion that [the Fifth Circuit] treat the DOI's response as no response at all, and [the court] decline[s] to do so." However, the Fifth Circuit comments that plaintiff "is, of course, free to file another complaint after he exhausts his administrative remedies" and remands the matter to the district court to modify its judgment to dismiss the claims without prejudice.

District Courts

1. Stuler v. IRS, No. 10-1342, 2011 U.S. Dist. LEXIS 66942 (W.D. Pa. June 23, 2011) (Ambrose, J.)

Re: Request for copies of "Complete Individual Master File – Martinsburg Computer Center" transcripts from 1994 – 2009

Holding: Dismissing, without prejudice, the complaint for failure to exhaust administrative remedies

• Exhaustion of administrative remedies/fees: As an initial matter, the court notes that the "a failure to exhaust administrative remedies under FOIA is properly evaluated pursuant to [*Federal Rule of Civil Procedure*] *12(b)(6)*," i.e., failure to state a claim upon which relief may be granted. Upon reviewing the

IRS's FOIA regulations, the court notes that "the IRS requires that the requester '[s]tate the firm agreement of the requester to pay the fees for search, duplication, and review . . . [or] place an upper limit for such fees that the requester is willing to pay, or request that such fees be reduced or waived and state the justification for such request.'" In accordance with the agency regulations, the court finds that "[a]bsent demonstration or claim of entitlement to a fee waiver, or commitment to pay applicable fees, an action is subject to dismissal for failure to state a claim." Here, the court concludes that plaintiff's "FOIA request did not comply with applicable regulations," noting that his "firm promise to pay fees and costs in the amount of '$00.00' is, on its face, not a promise to pay anything – it is a promise in form only, and not in substance." Moreover, the court finds that "[p]laintiff's 'promise' does not constitute a request for a waiver, as it does not state the justification for any such request." The court determines "[w]hen[, as here,] a requester declines to provide a firm agreement to pay for, or request a waiver of, fees and costs, the process is properly suspended pending compliance."

2. Pugh v. FBI, No. 10-1016, 2011 WL 2474026 (D.D.C. June 23, 2011) (Wilkins, J.)

Re: Requests for records pertaining to the identities of two confidential informants who allegedly supplied information in connection with plaintiff's criminal case

Holding: Dismissing plaintiff's constitutional tort and *Bivens* claims; denying plaintiff's request for monetary damages; and concluding that the FBI properly invoked Exemption 7(C) Glomar to neither confirm nor deny the existence of records on the two informants

• Exemption 7(C) (Glomar)**:** The court concludes that the FBI properly invoked Glomar in connection Exemption 7(C) in response to plaintiff's request for information concerning the identities of informants. "In this case, because plaintiff submitted neither privacy waivers nor proof of death for [two informants], the FBI 'had to determine whether the plaintiff's asserted public interest in disclosure of these records outweighed privacy interests' of these individuals." The court quotes the FBI's declarant who attested that "'[i]nherent in [the FBI's] 'Glomar' response [was] its conclusion that the privacy interests of these two individuals outweighed any public interest in disclosure, which plaintiff failed to articulate.'" The court finds that "[p]laintiff's unsupported assertion of government wrongdoing is far less than is needed to demonstrate 'that the public interest sought to be advanced is a significant one,' and that the release of the requested information 'is likely to advance that interest.'" The court likewise determines that the fact "[t]hat the FBI's denial of [plaintiff's] FOIA request may hinder his efforts to challenge his conviction or sentence . . . is irrelevant." Additionally, the court notes that "[p]laintiff cannot overcome the informants' privacy interests by claiming he already knows their identities," "[n]or does the passage of time diminish [the informant's] privacy interests."

• Litigation considerations: The court dismisses plaintiff's constitutional torts claim for lack of subject matter jurisdiction and his *Bivens* claim, related to the processing of his FOIA request, for failure to state a claim upon which relief may be granted. Additionally, the court denies plaintiff's request for compensatory damages in the amount of $7 million because "[m]onetary damages are not available under the FOIA."

3. Vest v. Dep't of the Air Force, No. 09-1083, 2011 WL 2469593 (D.D.C. June 22, 2011) (Walton, J.)

Re: Requests for records concerning individuals that plaintiff believes "may figure in some of the mysterious circumstances surrounding his father's death in Texas in 1946," and for records pertaining to plaintiff

Holding: Dismissing claims against six defendants based on plaintiff's failure to exhaust administrative remedies; granting summary judgment for three defendants based on the adequacy of their searches; and concluding that the FBI properly asserted Exemption 7(C) for records concerning a third party

• Exhaustion of administrative remedies: The court concludes that plaintiff failed to exhaust administrative remedies for requests submitted to the Department of the Army, Department of the Navy, Marine Corps, DHS, Department of State, and the CIA. With respect to a request submitted to the Army, plaintiff failed to reasonably describe the records sought concerning a third party or to respond to the Army's request for additional information. The court finds that "plaintiff's argument that he should have been informed of his right to appeal is without merit" because his unperfected FOIA request did not trigger the Army's obligations under the FOIA. Likewise, the court finds that with respect to his request to the Navy, "plaintiff never responded to the request for additional information and thus failed to perfect his FOIA request." The court also finds that plaintiff failed to exhaust his administrative remedies in connection with a request submitted to the Marine Corps where the Marine Corps advised the plaintiff of the deficiencies in his request, but plaintiff never cured those deficiencies or indicated a willingness to pay fees or request a fee waiver as required by the agency's FOIA regulations.

With regard to a request sent to DHS, the court finds that the plaintiff failed to exhaust administrative remedies "because, among other reasons, he failed to provide third-party authorization for the release of documents as mandated by [the agency's FOIA regulations]." The court concludes plaintiff's argument that "the regulations are invalid" "lacks merit," finding that plaintiff's reliance on the D.C. Circuit's decision in *Greentree v. U.S. Customs Service* for the proposition that "an agency may not refuse to process a request for third party information in the absence of a privacy waiver because the Privacy Act is 'not to be used as a barrier to FOIA access'" is inapposite. The court notes that *Greentree* dealt with the narrow issue of whether the Privacy Act qualifies as an Exemption 3 statute, an issue not relevant here. As to plaintiff's request to the Department of State, the court finds that "the agency's declaration clearly indicates that the plaintiff failed to make a proper FOIA request, given that its Information and Privacy Coordinator 'could not process [the] request' 'without clarification of the records sought[ ] and provision of [the] additional information [that was] requested.'" Here, "plaintiff did not respond to the Department of State's request for additional information . . . and thus failed to perfect his FOIA request." Similarly, the court concludes that plaintiff did not perfect his request to the CIA where he failed to provide additional identifying information for two individuals who were the subjects of his request.

• Adequacy of search: The court holds that the Air Force, the Defense Intelligence Agency (DIA) and the FBI each conducted adequate searches in response to plaintiff's requests. With regard to the certain component offices within the Air Force, the court "is satisfied that [those offices] undertook 'a good faith effort to conduct a search for requested records, using methods which can reasonably be expected to produce the information requested.'" The court notes that the agency's "declaration describes the different databases that were searched and the terminology used to perform the searches" and the agency explained that the search encompassed "all of the names provided in the plaintiff's request, as well as the serial number and suspected dates of birth he submitted." Additionally, "plaintiff's contention that the Air Force did not certify that it searched '*all the indices* that may contain relevant records,' . . . does not persuade the Court that the search procedure employed by Air Force was deficient" because "'[t]here is no requirement that an agency search every record system in which responsive documents might conceivably be found.'" The court also rejects plaintiff's argument that Air Force should have searched for "'logical . . . [and] spelling variants' of the names provided in the requests," finding that "the FOIA does not mandate a 'perfect' search, only an 'adequate' one."

The court likewise awards summary judgment to the DIA with respect to the adequacy of its search, concluding that "the search conducted by DIA was reasonably calculated to produce the information requested" where it searched "its 'two primary databases'" using variations of the subject's name and "plaintiff has not provided any evidence to show that the DIA acted in bad faith." The court also concludes that the FBI's search for records pertaining to a third party was adequate, noting that the FBI searched for cross-references in its central office and four field offices as well as queried its electronic surveillance

database. Regarding plaintiff's challenge to the FBI's search for pre-1960 electronic records, the court finds that the agency's "supplemental declaration makes it clear that, to the extent a field office even had records of this sort, those records were searched and no references to [the subject] were found." Additionally, the court comments that "plaintiff has not provided any proof to show that the DOJ/FBI acted in bad faith."

• Exemption 7(C): The court holds that the FBI properly invoked Exemption 7(C) in connection with plaintiff's request for information about a third party for which he did not provide consent, proof of death, or demonstrate a countervailing public interest. With regard to plaintiff's assertion that the FBI should have taken steps to ascertain whether the subject of the request was deceased, the court finds that "[w]hile on first blush it appears that the DOJ/FBI should have taken the life status of [the subject] into account, '[t]he effect of an individual's death on [their] privacy interests need not be factored into an Exemption 7(C) balancing test . . . where no public interest would be served by the disclosure of that individual's name or other identifying information.'" For one, the court notes that "even after death, a person and their relations retain some privacy interest, and 'something, even a modest privacy interest, outweighs nothing every time.'" As such, the court concludes that in order "for the DOJ/FBI's failure to consider [the subject's] life status to be relevant, and actually 'trigger the balancing of public interests against private interests' under Exemption 7(C), the plaintiff 'must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.'" Here, the court finds that plaintiff has not articulated a "cognizable public interest," noting that plaintiff's stated interest in "disclosing information about the activities of [the subject], apparently a third party with no connection to the plaintiff, . . . and how those activities might relate to the death of plaintiff's father over sixty years ago would reveal little or nothing (based on the information provided by plaintiff) about the FBI's own conduct or shed light on the activities of the government in general."

4. Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs, No. 05-2039, 2011 U.S. Dist. LEXIS 65575 (E.D. Mo. June 21, 2011) (Buckles, Mag.)

Re: Request for various records pertaining to task force studying flood risk and recurrence on the Mississippi, Missouri and Illinois rivers; at issue, on remand, is the segregability of documents withheld pursuant to the deliberative process privilege

Holding: Upon conducting segregability analysis as ordered by the Eighth Circuit, the court adopts and incorporates the conclusions reached in its previous memorandum and order granting summary judgment in favor of the U.S. Army Corps of Engineers on the basis that the agency properly asserted the deliberative process privilege to withhold the documents at issue

• Exemption 5 (deliberative process privilege)/segregability: Following a remand from the Eighth Circuit, the court considers the segregability of documents which were all withheld by defendant under Exemption 5 in connection with the deliberative process privilege. As an initial matter, the court notes that "Plaintiff has in no way challenged the adequacy of Defendant's efforts." Based on the supplemental submissions provided by defendant, the court now concludes that "all reasonably segregable non-exempt information has been released to Plaintiff, and that the redacted portions contain no reasonably segregable information." The court finds that the supplemental "[d]eclaration clearly shows that [the declarant] reviewed and processed each and every requested document for the purpose of identifying and releasing any and all segregable information." Additionally, the court determines that "[d]efendant's justifications are sufficiently detailed, and they correlate the specific redacted information with the basis for claiming *Exemption 5.*" Lastly, the declarant's statement "that the redacted portions of the documents are not segregable is supported by review of the redacted documents themselves." Accordingly, the court adopts and incorporates the findings reached in its previous memorandum and order granting summary judgment to defendant.

5. Dourlain v. United States, No. 10-768, 2011 WL 2444787 (Fed. Cl. June 16, 2011) (Williams, J.)

Re: Claim that the IRS violated the FOIA by failing to promulgate regulations dealing with the assessment of penalties

Holding: Dismissing plaintiff's FOIA claim based on lack of jurisdiction

• Jurisdiction: The court dismisses plaintiff's FOIA claim, finding that "to the extent Plaintiff alleges a violation of FOIA, it is well settled that this Court lacks jurisdiction to hear this claim."

Topic(s):
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