American Society of Access Professionals
"FOIA Court Case Updates"
Sunshine Week – March 18, 2025

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PROCEDURAL ISSUES

"Reading Room" Records

***Campaign for Accountability v. Dep't of Justice*, 732 F. Supp. 3d 63 (D.D.C. 2024), *appeal pending*, No. 24-5163 (D.C. Cir.)** — holding the Office of Legal Counsel's "formal written opinions that resolve disputes between agencies" qualify as both "final opinions made in the adjudication of cases" and "statements of policy and interpretations," and thus are Section 552(a)(2) "reading room" records; noting "the overarching purpose of the reading-room provision—to prevent the development of secret law—casts a wider net than the OLC imagines"; concluding, however, that the court cannot order OLC to upload records into its reading room, but only to require disclosure of the opinions with an index to the requester.

Definition of a "Record" / Record Segmentation

***Inst. for Energy Research v. FERC,* No. 22-3414, 2024 WL 1091791 (D.D.C. Mar. 13, 2024)** — holding agency did not unreasonably define a record as a single text message when requester sought "text messages" containing any one or more of four words (FERC, GHG, FOIA, methane) but did not ask for "text threads, text conversations, or text discussions"; observing that "[u]nlike email threads, which tend to contain 'a natural progression of conversation on a unified topic,' … a text message thread captures the entire conversation history between two people, with no 'Subject' lines or discrete chains to demarcate new topics."

Record Creation

***Gelb v. Dep't of Def.*, No. 23-0995, 2025 WL 49882 (D.D.C. Jan. 8, 2025), *appeal pending*, No. 25-5055 (D.C. Cir.)** — holding, in relevant part, that the Defense Finance and Accounting Service was not required to "create a computer program that obtains and synthesizes information from multiple databases to create a record that does not otherwise exist," *i.e.*, a report of "stale-dated checks and EFT payments worth $100,000 or more, issued between 2017 and 2020, that remain uncashed[.]"

Agency Control

***Cox v. Dep't of Justice*, 111 F.4th 198 (2d Cir. 2024)** — holding that draft and final versions of a Senate Committee generated report transmitted to various federal agencies was a congressional record not subject to FOIA because the Senate Committee manifested a clear intent to control the report such that agencies receiving the report were not free to use and dispose of it as they saw fit. For example, the Senate Committee's work was conducted on a "stand-alone computer system in the

[CIA's] Reading Room" and access to that system by agency staff was restricted. Additionally, the Memorandum of Understanding between the Senate Committee and the CIA explicitly provided that "[a]ny documents generated on the [stand-alone computer system] by [Senate] Committee staff … are the property of the [Senate] Committee and are not CIA records under the Freedom of Information Act or any other law."

Public Doman / Official Acknowledgment

***Nat'l Sec. Archive v. Cent. Intelligence Agency*, 104 F.4th 267 (D.C. Cir. 2024)** — affirming the district court's decision that the CIA properly invoked Exemptions 1 and 3 to withhold a 1989 report drafted by Lt. Gen. Leonard H. Perroots concerning the "Able Archer 83" military exercise and the increased threat of nuclear war with the Soviet Union; rejecting the requester's argument that the CIA was precluded from withholding the memo under the "official acknowledgment" and "public domain" doctrines due to the State Department having published a transcribed version with the CIA's blessing.

Reasonable Description / Unduly Burdensome

***Wright v. Fed. Bureau of Investigation*, No. 18-0687, 2024 WL 4263867 (D.D.C. Sept. 23, 2024)** — Requester sought from FBI "all records discussing mosques" in the context of six distinct categories. The agency argued the request "lacked 'descriptors to assist the FBI in locating records concerning a topic as broad as 'mosques' …, thereby providing no reasonable way to search FBI records for this broad topic.'" The agency demonstrated this by conducting a search for the word "mosque" on SENTINEL – FBI's electronic case management system – which resulted in 1,062,851 records. When the agency applied Boolean operators to the search, the result was 1,854,315 records. The higher yield from the Boolean search, the agency said, was '"because it's possible for the same document to hit repeatedly across several of the search queries."' The court held that the "voluminous search results" showed the request was unreasonably burdensome and the FOIA did not require the agency to process such a request.

***Freedom Coal. of Doctors for Choice v. Ctrs. for Disease Control & Prevention*, No. 23-0102, 2024 WL 69084 (N.D. Tex. Jan. 5, 2024)** — Requester sought from CDC, on an expedited basis, production of about 7.8 million free-text responses (FTR) contained in that agency's COVID-19 vaccine safety monitoring program "V-safe." The program used a smartphone-based application allowing participants to voluntarily enroll and report their (or a dependent's) health after receiving the COVID-19 vaccine. The FTR limited the response to 250 characters or less. CDC denied expedited processing and withheld all FTR responses because many included unsolicited personally identifiable information (PII) such as names, birthdates, and social security numbers, and the agency "lack[ed the] resources to manually review the data to segregate the non-exempt portions." The court concluded that CDC must produce the FTRs on an expedited basis, review the responses for PII, and redact that information under FOIA Exemption 6. The court found the responsive records "not so voluminous as to present an unreasonable burden" because the each FTR was no greater than 250 characters, most averaged only 35 characters, just 7% of the total yield contained unsolicited PII requiring segregation.

Search Adequacy

***Leopold v. Dep't of Def.*, No. 14-0030, 2024 WL 4332566 (D.D.C. Sept. 27, 2024)** — in a ten-year-old case involving fifty FOIA requests about practices at the Guantanamo Bay detention facility, holding in relevant part that the agency failed to demonstrate the adequacy of its search for artists'

renderings of detainees, in part because it failed to describe its search terms, the files its searched, and the types of searches undertaken (*i.e.*, physical, electronic, or both); holding also that the agency properly searched for other kinds of records, including videos of enteral feedings, but that additional information was needed to determine the reasonableness of the agency's responsiveness review, as well as its ability to determine if the videos are categorically exempt under multiple exemptions.

Production Schedules / Open America *Stays*

***Children's Health Def. v. Food & Drug Admin.*, No. 23-0220, 2024 WL 147851 (D.D.C. Jan. 12, 2024)** — Plaintiff asked D.D.C. Judge Randolph Moss to compel FDA to respond to its FOIA request for records connected to the safety monitoring of the COVID-19 vaccine through that agency's VAERS database. FDA asked the judge to grant it an 18-month *Open America* stay because of two orders issued in two unrelated FOIA cases (*PHMPT1* and *PHMPT2*) before Judge Mark T. Pittman of N.D. Tex. The *PHMPT1* order required FDA to produce 55,000 pages per month, and the *PHMPT2* order required FDA to produce 360,000 pages per month. Judge Moss granted FDA a 6-month *Open America* stay, having not been convinced that an 18-month stay was appropriate "at this stage in the proceeding[.]" The Court noted that although "the court-ordered production rate [of *PHMPT1* and *PHMPT2*] far exceeded what is typical in this Court[,]" it was "not this Court's role to second guess another district court[,]" and that if FDA's position was that the production burden in *PHMPT1* and *PHMPT2* was excessive "it should take it up with that court."

"Clawback" Requests

***Human Rights Def. Ctr. v. U.S. Park Police*, 126 F.4th 708 (D.C. Cir. 2025)** — in relevant part, vacating the district court's order preventing plaintiff from disclosing, disseminating, or making use of the inadvertently disclosed names of two agency law enforcement officers involved in tort settlements; concluding that "neither FOIA nor any inherent judicial authority" provides judicial relief for an agency to limit the effects of mistaken disclosure; opining that a contrary Tenth Circuit decision neglected to properly consider "important limitations on courts' inherent authority"; expressing no opinion as to whether a court may clawback documents "subject to any independent legal prohibition on disclosure such as applies to classified documents"; also declining to consider whether the First Amendment prevents a court from issuing a clawback order.

Attorney's Fees

Louise Trauma Ctr. LLC v. Wolf*, No. 20-2348, 2024 WL 4227617 (D.D.C. Sept. 18, 2024)** — Requester, referred throughout as the "Center", was described by the Court as "alleg[ing to be] a 'nonprofit organization dedicated to raising awareness about immigrant women who have suffered from gender-based violence'[,]" submitted 9 FOIA requests (one to ICE, the rest to USCIS) between September 2019 and April 2020, and in August 2020 filed suit. After the agencies released 20,206 pages of records, the Center moved for attorney's fees. The agencies posited that the Center was nothing more than "a front for the collection of attorney's fees", and the Court noted that the Center "has done a poor job of explaining *how* it furthers its mission" especially when it appeared "that the Center merely uploads to its website various records that it obtains from FOIA cases and offers no analysis of the records[, and does not] appear to offer any other assistance to immigrant women, such as housing or other support." Nonetheless, the Court concluded that the Center was entitled to attorney's fees based on the factors laid out in *McKinley v. Fed. Housing Fin. Agency*, 739 F.3d 707, 710 (D.C. Cir. 2014). However, the Court declined to award ***any fees because the Center's fee request was

"patently unreasonable." The Court identified 15 deficiencies in the Center's fee request concerning its time records for billing purposes as well as the fact that its fee request was "grossly out of line with requests in similar cases reflecting an extraordinary lack of billing judgment." The Court also noted that the Center's counsel had been reprimanded by two other judges "for his improper billing practices." Given the Center's counsel's continued submission of "increasingly exaggerated fee requests" despite repeated admonishment by the courts of that practice, the judge in this case "exercised [her] discretion to deny attorney's fees 'as a means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated and conscientiously measured claims.'"

EXEMPTION 3

***Biddle v. Dep't of Def.*, No. 23-1380, 2024 WL 4188510 (D.D.C. Sept. 13, 2024)** — in a case involving 10 U.S.C. § 130e and the withholding of roughly 5,000 pages of ostensible "critical infrastructure security information," concluding the agency's "overly brief, generalized, and technical (in part) affidavit" did not provide adequate information for the court to rule on the agency's invocation of Exemption 3, but merely included a "few short paragraphs" of "generalizations and conclusory statements" that failed even to "explain to what 'critical infrastructure' the withheld records relate"; cautioning the agency to include all exemptions it seeks to invoke in any renewed summary judgment motion and to not "reserve" any of them.

EXEMPTION 5

Consultant Corollary

Am. Oversight v. Dep't of Health & Human Servs.*, 101 F.4th 909 (D.C. Cir. 2024)** — In early 2017, House Republican leaders sought to repeal the Affordable Care Act (ACA). While that effort was gaining steam, the requester submitted a FOIA to HHS and OMB seeking "communications 'relating to healthcare reform' between each agency and Congress.'" Citing the "consultant corollary" of Exemption 5, the agencies withheld these as intra-agency records covered by the deliberative process privilege "because the communications were between Trump Administration officials and Republican members of Congress, and their staffs, who shared the 'goal of repealing and replacing' the [ACA]'". The requester disputed this arguing that the agency outsiders here – members of Congress and their staffs – "represented an interest of their own in the matters under discussion." Based in part on one agency's declaration that its communications were "to influence and shape pending legislation by discussing, consulting, and negotiating with Congressional personnel" including areas where the Administration and Congress disagreed, the D.C. Circuit held that the consultant corollary did not apply to these communications because "[i]n this case, the record makes clear that … each side had an independent stake in the potential healthcare reform legislation under discussion." In doing so, the Court concluded the key inquiry in determining if the consultant corollary applies is whether the outsider-consultant has "a stake in the outcome of the agency's process that would render its advice on the subject anything other than disinterested." In other words, is the outsider-consultant akin to an agency employee in that its "only 'obligations are to truth and its sense of what good judgment calls for.'" Importantly, the Court wrote that it was ***not deciding "whether members of Congress or their staffs could ever satisfy the post-Klamath consultant corollary requirements."

Deliberative-Process Privilege

***Leopold v. Dep't of Justice*, No. 20-03651, 2024 WL 5159099 (D.D.C. Dec. 18, 2024)** — holding

the agency could not withhold under Exemption Five a document titled "OLA 2020 Election Triage" which outlined potential election day issues, included a section with hypothetical questions and answers, and provided step-by-step triage instructions for junior staff "to follow when handling inquiries from Members of Congress on election day" because this record was not "[t]alking points … complied for a senior official." On the contrary, the Court found this record was a set of talking points created by senior officials for use by subordinates who, unlike a senior official, did not have authority to depart or disregard its content. Since these talking points read to the Court "very much like a fixed script with no indication they [were] mere suggestions," the purpose of the document was to provide subordinates with the agency's "final guidance" and convey it "the pre-vetted content."

***Smartflash, LLC v. U.S. Patent & Trademark Office*, No. 23-3237, 2024 WL 4836402 (D.D.C. Nov. 20, 2024)** — in a case involving a "meta-FOIA request" for FOIA processing notes, holding the deliberative-process privilege applied to six e-mails containing pre-decisional "preliminary impressions, analysis, questions, and recommendations," including communications from a superior to his subordinates—specifically, proposals from a "FOIA Coordinator Lead . . . to his team" when he had not "yet had a chance to digest this request"—that were best characterized as "early-stage subjective opinions" rather than some "final view on the matter"; holding also that the agency satisfied the foreseeable-harm standard because it explained how "harm . . . would be caused by disclosure," including a "chilling effect" that would lead to "slower, less accurate FOIA decisions."

Attorney-Client Privilege

***Project on Gov't Oversight v. Dep't of Justice*, No. 20-1415, 2024 WL 4253164 (D.D.C. Sept. 20, 2024)** — holding the agency properly invoked the attorney-client privilege to withhold titles of Office of Legal Counsel opinions, as well as the names of corresponding agency clients that received those opinions, from lists of all OLC opinions issued over the course of twenty-two years; noting the agency adequately explained how the redacted titles are "more than just general subjects" and instead "identify the legal questions presented, often with specific reference to particular statutory provisions and subparts," and may at times "disclose the potential decisions under consideration by the client agency"; failing to offer any discussion about the agency's efforts to satisfy the foreseeable-harm standard.

Foreseeable Harm

***Cizek v. Dep't of Def.*, No. 23-0023, 2024 WL 4332111 (D.D.C. Sept. 27, 2024)** — in a case involving a former Air Force chaplain seeking records about an investigation into his own claims of reprisal for protected whistleblower communications, holding, in relevant part, that the agency's technical use of Exemption 5 to withhold portions of a memorandum in response to a request for investigation was correct, but that the agency failed to demonstrate foreseeable-harm; describing the agency's position as "worthy of the criticism voiced in *Reporters Committee*," namely, that it was "wholly generalized and conclusory" and amounted to a "perfunctory parroting of the statutory" standard.

EXEMPTION 6

***Insider, Inc. v. Gen. Servs. Admin.*, 92 F.4th 1131 (D.C. Cir. 2024)** — in a case for documents about the Trump/Pence exit presidential transition, holding that GSA correctly disclosed expense forms listing salaries and benefits while withholding the names of "low-level" staff paid under $60,000/year, unless they were public officials or had made their names public; noting that such individuals had substantial privacy interests because other transition staff and "their families, were

harassed by members of the public through email and phone communication," and there was no public interest in disclosure as "GSA does not hire the transition team members, set the amount of their compensation, or control their job responsibilities."

EXEMPTION 7(A)

***Leopold v. Fed. Bureau of Investigation*, No. 22-1921, 2025 WL 445183 (D.D.C. Feb. 10, 2025)** — in a case concerning access to the FBI's Mar-a-Lago investigative file, rejecting the agency's reliance on Exemption 7(A) and its *Glomar* response, in large part because there was no longer any pending law enforcement proceeding (*i.e.*, charges against President Trump had been dismissed), and future proceedings were not reasonably anticipated as President Trump would likely be immune from prosecution; noting the agency failed to support its position vis-à-vis any suggestion of alleged criminal conduct by President Trump after the 2020 presidential election.

EXEMPTION 7(C)

***McWatters v. ATF*, No. 24-5083, 2025 WL 457639 (D.C. Cir. Feb. 11, 2025)** — Requester sought from ATF the release of a 30-minute recording which captures a nightclub fire and surrounding events that killed 100 people at a February 2003 concert in West Warwick, RI. At issue in this case was the first four minutes of the final eight minutes of the recording where ATF stated that human sounds were audible. The Court held that ATF properly invoked Exemption 7(C) to withhold this portion of the recording since the surviving members of the deceased, who can be heard on this part of the recording, "have a right to personal privacy with respect to images and audio of their close relative's final moments." Requester's public interest argument did not outweigh the privacy interest because the Court found requester sought "the information for its own sake" since requester's stated public interest was merely to "'evaluate' ATF's 'investigation and resulting report' of the Station Nightclub fire 'in order to facilitate better fire investigations and fire safety recommendations.'" The Court construed this public interest rationale as essentially the requester expecting to "find something in the tape that ATF missed" and concluded such "speculation … insufficient to state a significant public interest" because otherwise "any law enforcement record would serve the public interest because it, too, would allow the public to 'evaluate' an investigation and resulting report."

EXEMPTION 7(E)

***Fogg v. Internal Revenue Serv.*, 106 F.4th 779 (8th Cir. 2024)** — Internal Revenue Manual (IRM) section 21.1.3.3 deals with third-party authentication, and much of that is available to the public, but the IRS redacted some portions of IRM pursuant to Exemption 7(E) "'relating to 'specialty situations' in which the IRS uses 'unique' authentication procedures to combat unauthorized disclosure of sensitive taxpayer information, identity theft, and criminal fraud.'" After reviewing the redacted contents, the Court held that IRS properly withheld under this exemption because "the redacted contents all involve techniques and procedures the IRS uses for law enforcement investigations." For example, the redacted contents help the agency "authenticate a caller's identity in special scenarios in which the caller raises a suspicion of fraud." Moreover, the redacted contents reflect "non-standard scenarios, not involving every third-party caller" and the techniques and procedures reflected in the redacted contents "help the IRS conduct its law enforcement investigation into callers' identities, thus preventing tax fraud."