American Society of Access Professionals FOIA/Privacy Act Workshop
"Updates from the Courts: Developments in FOIA Case Law"
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PROCEDURAL ISSUES

"Reading Room" Records

***Campaign for Accountability v. DOJ*, No. 16-1068, 2024 WL 1701640 (D.D.C. Apr. 19, 2024), *appeal pending*, No. 24-5163 (D.C. Cir.)** — holding that 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.

Reasonable Description

***Sherven v. CIA*, No. 23-466, 2023 WL 8649897 (W.D. Wis. Dec. 14, 2023)** — rejecting a *pro se* requester's complaint for failure to state a claim; ruling a request for all records "involved in every CIA operation to cover up their illegal activities and hide them from the general public" to be invalid because it asks "CIA employees to make their own determination regarding what conduct was 'illegal' and what qualifies as a 'cover up,' without any limitation on time or place."

Definition of a "Record" / Record Segmentation

***Ulis v. FBI*, No. 23-636, 2023 WL 8620632 (D.D.C. Dec. 13, 2023)** — denying a request for "the 'skinny black JC Penney Towncraft #3 clip-on tie' that [D.B.] Cooper removed before his [1971] mid-flight farewell with $200,000 in ransom," even though the requester believed it contained previously undiscovered DNA evidence; ruling the "FOIA only compels production of 'records,' not tangible objects," and a necktie "struggles to find a place within the common understanding of a 'record'" because it is "incapable of replication or copying and thus is not 'reproducible.'"

***Inst. for Energy Research v. FERC*, No. 22-3414, 2024 WL 1091791 (D.D.C. Mar. 13, 2024)** — ruling, in relevant part, that FERC conducted reasonably defined a "record" as a single text message where the requester sought texts containing any of four terms and did not request "threads"; noting 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."

Agency Control

***Cox v. DOJ*, No. 22-1202, 2024 WL 3642871 (2d Cir. Aug. 5, 2024)** — ruling that a U.S. Senate Select Committee on Intelligence report concerning a post-9/11 CIA detention and interrogation program was not an "agency record" subject to the FOIA, despite having been circulated in final form to various agencies; relying on *Behar v. DHS*, 39 F.4th 81 (2d Cir. 2022), and its adoption of the D.C. Circuit's "modified control test," *viz.*, did Congress "manifest[] a clear intent to control the [record at issue] at the time of its creation . . . and [did] subsequent acts . . . vitiate that intent"; of note, agreeing with *ACLU v. CIA*, 823 F.3d 655 (D.C. Cir. 2016), which concerned the same report.

Record Creation

***ACLU Immigrants' Rights Project v. ICE*, 58 F.4th 643 (2nd Cir. 2023)** — seemingly departing from decisions issued by and within the 2nd, 3rd, 5th, 6th, 9th, and D.C. Circuits, to rule that an agency must substitute unique identifying numbers for FOIA-exempt alien identification numbers, even though it seemingly involves the creation of new records.

***Rutila v. Dep't of Transp.*, 72 F.4th 692 (5th Cir. 2023)** — ruling an agency had no obligation to produce screenshots of information from its computer systems because that "would require more than an 'electronic search'" for "pre-existing records followed by 'extract[ion] and compil[ation]'"; explaining that the agency would instead need to "'open the software and create a screenshot, which would not otherwise exist from the last time the agency opened the software[.]'"

Search Adequacy

***Yim v. NIH*, No. 23-1601, 2023 WL 6783500 (3d Cir. Oct. 13, 2023) (*per curiam*), *cert. denied*, No. 23-965 (U.S. Apr. 29, 2024)** — in an unusual search issue, the requester sought a copy of an NIH-panel-approved update concerning the use of ivermectin, an antiparasitic drug, to the agency's non-binding guidelines for treating patients with COVID-19; the agency provided him with a link to the publicly available recommendation; the court approved the agency's search and determination that the recommendation was responsive, despite the requester's strongly held belief that he should have received a "no records" response because he believed no panel vote had ever been held.

Segregability

***Phillips v. DHS*, No. 19-0928, 2024 WL 1239704 (D.D.C. Mar. 22, 2024)** — ruling, in relevant part, that the government produced all reasonably segregable records when it withheld in full two video interviews of alien detainees and, instead, provided the requester with Reports of Investigation redacted under Exemptions 6 and 7(C) reflecting the contents of the detainee videos; ruling that it would be unreasonable for the agency to expend "75 to 150 hours" deleting all except "'non-lexical' information—such as video showing the movements of the detainees and interviewers, their reactions, and general emotional states"; rejecting requester's alternative proposal that the agency release redacted videos "with voice modulation (to mask the participants' voices) and the deletion of any statements that might identify the participants," as it would entail "creating an essentially new record at substantial effort and expense."

EXEMPTION 1

***James Madison Project v. ODNI*, No. 22-0647, 2024 WL 1299336 (D.D.C. Mar. 26, 2024)** — after concluding records pertaining to the "Havana Syndrome" were protected under Exemptions 1 and 3, ruling that "[r]easonably foreseeable harm is always present when the Government properly invokes exemption 1, because significant harm from disclosure is a requirement for classification[.]"

EXEMPTION 4

***Citizens for Responsibility & Ethics in Wash. v. DOJ*, No. 19-3626, 2024 WL 1406550 (D.D.C. Mar. 31, 2024)** — on remand from *CREW v. DOJ*, 58 F.4th 1255 (D.C. Cir. 2023), ruling that the identities of parties contracting with BOP to provide pentobarbital for executions, which were conceded to be "confidential" under Exemption 4, also satisfied the exemption's "commercial" prong as the "contractors' work for the government is a commercial operation" and "disclosure would reveal that the contractors have sold a product and/or service to the government"; ruling also that disputed contractual terms were properly "confidential," and the foreseeable-harm standard was met because disclosure could lead to "harassment, threats, and negative publicity leading to commercial decline"; distinguishing other cases in which contractors' names have not been found to be commercial because in those cases the names were not "confidential."

***AMA Sys., LLC v. Food & Drug Admin.*, No. 23-0489, 2024 WL 712465 (D. Md. Feb. 21, 2024)** — holding that Exemption 4 applied to certain records concerning a company's unsuccessful application to produce single-use surgical masks for emergency use as PPE during the pandemic; noting the company submitted its application under an implied assurance of privacy arising from agency practice and regulations; holding that the foreseeable-harm standard did not apply because disclosure of Exemption 4-protected material is "prohibited by law" under the Trade Secrets Act.

EXEMPTION 5

***Am. Oversight v. HHS*, 101 F.4th 909 (D.C. Cir. 2024)** — reversing district court and holding, in relevant part, that communications between agencies and congressional staff regarding the "substance of potential legislation" do satisfy Exemption 5's threshold requirement under the "consultant corollary"; reasoning that the Supreme Court's decision in *Klamath* forecloses use of the corollary because, at least here, "each side had an independent stake in the potential healthcare reform" and congressional staff were not truly "disinterested"; one panel member, in dissent, argued the judgment was "actually quite breathtaking" and would "chill communications between Congress and the Executive, stymie the working relationship between Congress and the Executive, and inhibit the President's ability to perform effectively the core Article II duty of recommending legislation to the Congress."

***Vanda Pharmaceuticals, Inc. v. FDA*, No. 22-0938, 2023 WL 2645714 (D.D.C. Mar. 27, 2023)** — holding that even if clinical and statistical reviews of a requester's pending supplemental New Drug Application ("sNDA") were covered by deliberative-process privilege, FDA could not satisfy the foreseeable-harm standard; explaining disclosure would not likely chill internal deliberations because sNDAs are already disclosed "in a variety of circumstances," including whenever one is approved, and the agency's concern that a drug manufacturer might use such records to mislead

public and medical practitioners was too speculative. *But see Juul Labs, Inc. v. FDA*, No. 22-2853, 2024 WL 1733043 (D.D.C. Apr. 23, 2024) (accepting "supervisory-review-focused chilling effect" where records are routinely disclosed or required to be disclosed eventually).

***Ams. for Prosperity Found. v. CMS,* No. 21-2021, 2024 WL 578955 (D.D.C. Feb. 13, 2024)** — in a case involving "records about CMS's efforts, or lack thereof, to recover Medicaid improper payments," after reviewing agency's *in camera* affidavit but not the documents *in camera,* holding that a 30-year-old memorandum and its attachments, which the requester conceded were protected by the attorney-client privilege, could be withheld as the agency had shown reasonably foreseeable harm; noting "[t]he declaration provides critical context linking the materials at issue here to present-day concerns in a way that would not have been apparent from reading the documents themselves."

EXEMPTION 6

***Insider, Inc. v. GSA*, 92 F.4th 1131 (D.C. Cir. 2024)** — requester sought documents about the Trump/Pence exit presidential transition; GSA disclosed expense forms listing salaries and benefits, but withheld the names of "low-level" staff paid under $60,000/year unless they were public officials or had made their names public; these individuals had substantial privacy interests as 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)

***Zaid v. DOJ*, 66 F.4th 697 (4th Cir. 2024)** — despite requester's client having already been convicted of production and possession of child pornography, release of records could reasonably be expected to interfere with "ongoing proceedings in [his] own criminal case including his pending appeal and future collateral challenges," as well as "ongoing investigations into third part[ies]."

***N.Y. Times Co. v. FBI*, No. 22-2590, 2023 WL 5098071 (S.D.N.Y. Aug. 9, 2023)** — ruling that the FBI Behavioral Analysis Unit's 2021 report on the "Havana Syndrome," which would "provide substantial information about what the FBI knew and did not know regarding Anomalous Health Incidents at the time the BUA Report was drafted," still did not "logically relate to harm of an ongoing investigation" as "disclosing what the FBI did or did not know at least two years ago implies little plausible risk"; also taking judicial notice of an ODNI publication that "calls into question" whether there even is an ongoing law enforcement proceeding.

EXEMPTION 7(E)

***Gunowners of Am., Inc. v. FBI*, No. 22-3379, 2024 WL 195829 (D.D.C. Jan. 18, 2024)** — ruling that Exemption 7(E) protected "surveillance video taken by the [FBI] during the civil unrest in Kenosha . . . in August 2020," except for an 83-second clip played during the criminal trial of Kyle Rittenhouse, as the video "would disclose details about the FBI's surveillance program unknown to the public including the 'dates, times and locations chosen for surveillance' and the specific areas where the FBI chose to focus and zoom in on," as well as the identity of "FBI surveillance aircraft"; ruling that, "[i]n the context of Exemption 7(E) . . . no . . . foreseeable-harm analysis is necessary."