October 17, 2018

13th Annual FOIAXpress User Conference & Technology Summit

Recent Significant FOIA Decisions

Procedural Issues

Hyatt v. USPTO, No. 18-234 (D.D.C. Sep. 28, 2018) -- agency record; ruling single email message between two agency employees on agency server commenting on a newspaper article about requester's 1993 divorce proceedings to be an agency record even though the agency argued "it was not used in conducting of official Agency business"; rejecting agency argument since email "comments specifically on an element of Mr. Hyatt's character that reasonably would be at issue in any negotiations between Mr. Hyatt [who has many applications before the agency] and agency employees at any level."

Rocky Mountain Wild v. U.S. Forest Serv., 878 F.3d 1258 (10th Cir. 2018) -- agency records; OPEN Government Act; ruling that where a contractor for a ski area developer with which agency wished to trade land produced an Environmental Impact Statement, where no agency employee viewed contractor's EIS background records, those background records are not agency records; ruling that the records were never possessed or controlled by agency; those records were not "not maintained for the purposes of records management" since they were maintained by the ski developer's contractor, not a contractor of the agency.

Sai v. TSA, No. 14-403 (D.D.C. Sep. 25, 2018) (amended opinion) -- choice of format; metadata; ruling TSA has not shown why it could not "readily reproduce" records in "native electronic format" such as "Word, Excel, electronic PDF," in which they originally existed, even though its FOIA processing software, FOIAXpress, produced only PDFs; agency may be able to show that "release the records in their original format posed a burden on the agency of sufficient magnitude to justify its rejection of that request. It may be able to show, for example, that it could not have, at the time, "readily" ensured that redactions were not countermanded"; suggesting that in any event, TSA is not required to produce metadata.

Brennan Ctr. v. Dep't of State, No. 17-7520 (S.D.N.Y. Jan. 10, 2018) -- expedited processing; where agency determined that the 6 requested records met expedited processing standard six months ago, ruling that records must be processed within one month even though they are classified and have been referred to DHS, the originating agency; noting that "courts often find that one to two months is sufficient time for an agency to process broad FOIA requests that may involve classified or exempt material."

Negley v. Dep't of Justice, No. 15-1004 (D.D.C. Apr. 3, 2018) -- where requester is seeking all 500,000 pages of the UNABOM file, finding FBI's "standard rate of 500

pages per month would be appropriate," because there is no statutory basis for expediting the request, even though the requester is 70 years old.

Ecological Rights Found. v. FEMA, No. 16-5254 (N.D. Ca. Nov. 30, 2017) -- FOIA Improvement Act of 2016; holding that agency failed to show how records satisfied deliberative process privilege and further did "not provide any justification for how the agency would be harmed by disclosure as required by the FOIA Improvement Act of 2016 [and a]bsent a showing of foreseeable harm to an interest protected by the deliberative process exemption, the documents must be disclosed."

Rosenberg v. DOD, No. 17-437 (D.D.C. Sep. 27, 2018) -- FOIA Improvement Act of 2016; finding insufficient DOD's assessment of harms to its division of 114 deliberative process documents into 12 groups; "the court does not read the statutory 'foreseeable harm' requirement to go so far as to require the government to identify harm likely to result from disclosure of each of its Exemption 5 withholdings. A categorical approach will do."

Khine v. DHS, No. 17-1824 (D.D.C. Sep. 24, 2018) -- ruling agency's denial letter which states total pages withheld with applicable exemptions and those referred to another agency satisfies 5 U.S.C. § 552(a)(6)(A)(i)(I), which requires agency, for any adverse determination, to advise the requester of "the reasons therefor [and of] the right of such person to appeal to the head of the agency [any] adverse determination"; holding agency need not provide a *Vaughn* index at the administrative level nor provide any explanation of how it applied the FOIA Improvement Act of 2016's "foreseeable harm" standard.

Sikes v. Dep't of the Navy, 896 F.3d 1227 (11th Cir. July 19, 2018) -- ruling that even though an agency has provided records in response to a FOIA request, agency must provide the same records if requester seeks a second set of them.

Exemption 1

Competitive Ent. Inst. v. Dep't of Treasury, No. 17-1600 (D.D.C. Aug. 9, 2018) -- Ex. Order 13,526; foreign relations; protecting letter from Bank of England which contains "sensitive information regarding international regulatory standards, policy positions of the United States and the United Kingdom, [and] potential next steps both countries may take regarding application of those standards"; rejecting requester's argument that letter can't involve "foreign relations" since Bank of England is not a foreign government because "it is reasonable to believe that the disclosure of information may harm relations between the United States and a foreign country -- whether or not that information is from or pertains to the foreign government itself."

Exemption 5

Cause of Action v. Dep't of Justice, No. 17-1423 (D.D.C. Sep. 13, 2018) -- attorney-clent and deliberative process privileges; ruling attorney-client privilege inapplicable to email from Office of White House Counsel to OIP subject "FYI -- the administration has received several letters like the attached" concerning a congressional chairman's letter to 10 agencies telling them to treat all communications between them as non-agency records; on *in camera* review court finds no indication that the Office of Counsel was seeking legal advice and that while OIP sometimes provides legal advice, none was sought here; the subject of the Office of Counsel's email was not confidential because OIP referred to the chairman's letter which was public; finding deliberative process privilege inapplicable because although the communication was predecisional, it was not deliberative since it was factual and contained no recommendations.

Frank, LLP v. CFPB, No. 16-670 (D.D.C. Dec. 14, 2017) -- ruling that agency attorney's notes made during a settlement conversation in connection with an enforcement action that ultimately resulted in a consent order rather than a lawsuit qualified as attorney work product because "'litigation was fairly foreseeable' at the time the notes were created."

Climate Investigations Ctr. v. Dep't of Energy, No. 16-124 (D.D.C. Sep. 19, 2018) -- attorney-client privilege; ruling attorney-client privilege inapplicable to agency emails to, from, or forwarded to Southern Co., a contractor which had received a $300 million award from DOE for clean-coal technology at a power plant; because the privilege applies only to communications between "an attorney and his client," it does "not apply to communications involving agency personnel, the agency's attorneys, and a third party -- Southern Company's counsel."

Exemption 7

ACLU v. Dep't of Ed., No. 16-10613, 2018 WL 1586025 (D. Mass. Mar. 30, 2018) -- ruling documents concerning strategies for debt collection of student loans do not qualify under Exemption 7 (Exemption 7(E), in particular), because this is a contract matter and "[w]hen a borrower defaults on a student loan, he or she has not violated the law, and is not subject to criminal or civil sanctions."

Exemption 7(C)

Sikes v. Dep't of the Navy, 896 F.3d 1227 (11th Cir. 2018) -- where agency had disclosed Adm. Brooda's suicide note to his sailors in which he stated he "couldn't 'bear to bring dishonor' to his sailors based on accusations that he had worn two combat ribbons that he had not earned," ruling that there is a great privacy interest in [the] suicide note to his wife which "would intrude not only into the memory of a deceased loved one, but more specifically into the intimate and private relationship between Adm. Boorda and his wife. The note would reveal the deeply personal sentiments Adm. Boorda chose to share with

his wife in the last moments of his life -- quite likely to be a window into his most sincere reflections on their relationship together"; finding "scant" assertions of public interest.

100Reporters LLC v. Dep't of Justice, No. 14-1264 (D.D.C. June 13, 2018) -- protecting identities of 2,300 mid- to low-level employees of Siemens, who were interviewed in connection with Foreign Corrupt Practices Act post-conviction DOJ oversight and who are not known to be associated with their company's misconduct and whose cooperation is essential; ordering disclosure of identities and information concerning executives and members of the board of directors because "Siemens' plea and monitorship is public knowledge, as are the names of Siemens' executives and Board members."

Judicial Watch, Inc. v. NARA, 876 F.3d 346 (D.C. Cir. 2017) -- protecting copies of Independent Counsel draft indictments of Hillary Clinton; finding that even though the fact of such draft indictments is public, she has a significant privacy interest in them because she never had an opportunity to refute them since they were never been approved by a grand jury or subject to a trial; while there is a public interest in the functioning of the Independent Counsel, it is largely satisfied by the "voluminous information already in the public domain about the Independent Counsel's investigation of President and Mrs. Clinton."