

March 14, 2016

SUNSHINE WEEK 2016 AT THE NATIONAL ARCHIVES

Recent FOIA Litigation

Procedural Issues

Competitive Enterprise Inst. v. EPA, No. 13-1532, 2014 U.S. Dist. LEXIS 122907 (D.D.C. Sept. 4, 2014) -- denying plaintiff's FOIA claim because 5,000 requested text messages between two agency senior officials had been destroyed upon sending or receipt; granting injunction under the Administrative Procedure Act ordering agency to report its destruction practice to the Archivist of the United States.

Ayuda, Inc. v. FTC, No. 13-1266, 2014 WL 4829574 (D.D.C. Sept. 30, 2014) -- unreasonably burdensome; ruling that the agency may "withhold the entire universe of information contained in the data fields [of twenty million complaints] when only a small percentage of that information is exempt, but redacting the exempt information requires an unreasonably burdensome [8,000 hour] manual review."

Exemption 5

Nat'l Sec. Archive v. CIA, 752 F.3d 460 (D.C. Cir. 2014) (2-1 decision) -- deliberative process privilege; protecting 27-year-old draft of Volume V history of the Bay of Pigs invasion; finding the draft, including all factual portions, to have been prepared for CIA to make its determination as to its final history; fact that first four volumes were disclosed as a matter of discretion has no relevance to this document because otherwise agencies would never make discretionary disclosures.

Exemption 7(C)

Detroit Free Press v. Dep't of Justice, 796 F.3d 649 (6th Cir. 2015) -- ordering disclosure of mug shots of four recently convicted police officers based on controlling 6th circuit precedent; recognizing that FOIA's venue provision permits suit to be brought in 6th Circuit by use of a "straw man" requester; noting that prior 6th Circuit opinion was decided before Internet's storage and search capabilities were understood and before two recent conflicting opinions of other circuits (*reargued en banc* Mar. 9, 2016).

PETA v. NIH, No. 745 F.3d 535 (D.C. Cir. 2014) -- "Glomarization"; approving agency's refusal to confirm or deny whether records exist on three private researchers alleged by requester to have been subjects of agency investigations for cruelty to animals; finding significant privacy interest; finding "the public interest in understanding the agency's investigatory processes fails to outweigh the researchers' substantial interest in

nondisclosure”; ruling “shedding light on agency investigatory procedures” to be “insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing the targets of a law enforcement investigation”; similarly finding disclosure of whether agency maintained records on any of the three, without naming that specific individual, also appropriate for “Glomarization.”

Exemption 7(E)

Pub. Employees for Env'tl. Responsibility v. U.S. Section Int'l Boundary Water Comm'n, U.S.-Mexico, 740 F.3d 195 (D.C. Cir. 2014) -- following Justice Alito's concurring opinion in *Milner v. Navy*, 565 U.S. 5622 (2011), finds that emergency action plans that “describe the security precautions that law enforcement personnel should implement around the dams during emergency conditions” are “proactive steps designed to prevent criminal activity and to maintain security,” and are thus compiled for law enforcement purposes; ruling that the plans are law enforcement guidelines the disclosure of which would satisfy the “relatively low bar” for risk circumvention since they “describe the surveillance and detection of the cause of an emergency dam failure as well as the process for evaluating the dam failure when the emergency subsides.”

Exemption 7(F)

EPIC v. DHS, 777 F.3d 518 (D.C. Cir. 2015) -- “any individual”; reversing district court's disclosure order and protecting DHS's SOP setting out its “unified voluntary process for the orderly shut-down and restoration of wireless services during critical emergencies such as the threat of radio-activated improvised explosive devices”; ruling disclosure could reasonably be expected to permit “bad actors to circumvent or interfere with a law enforcement strategy designed to prevent activation of improvised explosive devices”; finding “any individual” to include any person near or responding to a critical emergency (*cert. denied* Jan. 2016).