



## U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

THE AMERICAN SOCIETY OF ACCESS PROFESSIONALS  
11<sup>TH</sup> ANNUAL WESTERN REGIONAL TRAINING CONFERENCE  
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Significant Recent Litigation

Exemption 1

Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), cert. granted, 527 U.S. 1063, cert. dismissed on mootness grounds & vacatur granted, 528 U.S. 1042 (1999) -- E.O. 12,958; foreign relations harm; 2-1 decision reversing district court, after in camera inspection by both courts; ordering disclosure of contents of British Home Office letter to Department of Justice concerning extradition of two persons to United States; refusing to defer to agency judgment of national security harm, based upon rationale that "classification decisions are not given deference" unless agency first makes acceptable showing of harm; appellate court decision vacated.

Exemption 2

Judicial Watch, Inc. v. United States Dep't of Commerce, 83 F. Supp. 2d 105 (D.D.C. 1999) -- "high 2"; protection of government credit card numbers, based upon "realistic possibility of . . . misuse and fraud."

Dayton Newspapers, Inc. v. Department of the Air Force, 107 F. Supp. 2d 912 (S.D. Ohio 1999) -- "high 2"; medical malpractice settlement figures in agency databases held not to qualify as "internal personnel rules and practices," even if their disclosure "would compromise the government's bargaining position."

Exemption 3

Times Publ'g Co. v. United States Dep't of Commerce, No. 00-14390, 2001 WL 10394 (11th Cir. Jan. 4, 2001) -- holding that Export Administration Act of 1979, 50 U.S.C. app. § 2411, qualifies as an Exemption 3 statute even though it "lapsed" in 1994.

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Exemption 4

McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999) -- "reverse FOIA"; holding that release of satellite launch vehicle contract "unit prices" would cause submitter competitive harm by permitting its customers to "bargain down ('ratchet down') prices" and its competitors to "underbid" it, violating Trade Secrets Act.

Center for Auto Safety v. National Highway Traffic Safety Admin., 93 F. Supp. 2d 1 (D.D.C. 2000) (appeal pending) -- submissions responsive to agency's "Information Request" merely describing "physical or performance characteristics of air bags" held not to be "trade secrets" because they are not "secret, commercially valuable plans, formulas, processes, or devices used in making preparing, compounding or processing air bags"; submissions held voluntary under Critical Mass because agency failed to comply with Paperwork Reduction Act; data not customarily disclosed where disclosures were made only under controlled circumstances; submitters have not "publicly disclosed" data by putting automobiles on market where air bags may be dismantled to learn this information because such "reverse engineering" would be expensive, time consuming, and dangerous.

Mallinckrodt Inc. v. West, No. 99-2276, 2000 U.S. Dist. LEXIS 11008 (D.D.C. June 22, 2000) -- "reverse FOIA"; observing that "it is beyond dispute that unit pricing data is required to be submitted in order to compete for a government contract and would therefore be disclosable," but holding that rebate and incentive provisions do not constitute unit pricing data; holding that rebate and incentive provisions were voluntarily submitted under Critical Mass because Blanket Purchase Agreement solicitation stated that they "should," rather than "must," be provided.

Public Citizen Health Research Group v. FDA, 185 F.3d 898 (D.C. Cir. 1999) -- rejecting consideration of any "public interest in safeguarding the health of human [drug] trial participants" under substantial competitive harm test; competitive harm found where disclosure would result in eliminating "much of the time and effort that would otherwise be required to market a product."

Exemption 5

Klamath Water Users Protective Ass'n v. Department of the Interior, 189 F.3d 1034 (9th Cir. 1999), reh'g denied, No. 97-36208 (9th Cir. Dec. 22, 1999), cert. granted, 69 U.S.L.W. 3192 (U.S. Sept. 26, 2000) (No. 99-1871) (oral argument heard Jan. 10, 2001) -- threshold requirement; holding that records submitted by Indian Tribes to agency in course of consultations involving development of local water-management project do not meet threshold requirement; even though agency requested advice of Tribes, "the matters with respect to which it sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest."

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AFGE v. HHS, 63 F. Supp. 2d 104 (D. Mass 1999), aff'd per curiam, No. 99-2208, 2000 U.S. App. LEXIS 10993 (1st Cir. May 18, 2000) -- deliberative process privilege; protecting draft of Indoor Air Quality survey; reasoning that disclosure of draft "would alert a careful reader to what recommended changes were and were not [accepted]"; recognizing that "release of incomplete, inaccurate or unsubstantiated information in the drafts could cause harm by providing the public with erroneous information."

Judicial Watch, Inc. v. United States Dep't of Justice, 102 F. Supp. 2d 6 (D.D.C. 2000) -- deliberative process privilege; protecting "notes handwritten by the Attorney General during meetings regarding DOJ's Campaign Finance Task Force" which "reflect the Attorney General's distillations of issues that she believed were important at the time of their discussion and which she wanted to memorialize for later reference"; records need not have been circulated, because the purpose of the privilege may also be served by exempting documents which the agency decision-maker herself prepared as part of her deliberation and decisionmaking process; rejecting argument that deliberative process privilege "expires" after deliberations have ended and relevant decision has been made.

Maine v. Department of the Interior, No. 00-122, 2000 WL 1910642 (D. Me. Dec. 26, 2000) (motion for stay pending appeal pending) -- attorney-client privilege; within five days agency must disclose documents concerning a proposal to list as endangered the Atlantic salmon populations of eight Maine rivers, because they contain only legal analyses and handwritten notes and agency has not demonstrated that these records contain client-communicated confidential fact exchanged between client and attorney; attorney work-product privilege; within five days, the agency must disclose documents because it has failed to identify the litigation for which each document was prepared, that the documents were prepared primarily in anticipation of litigation, that the documents were prepared by an attorney or an agent of an attorney, or that they contain anything other than factual material.

#### Exemption 6

Campaign for Family Farms v. Glickman, 200 F.3d 1180 (8th Cir. 2000) -- "reverse FOIA"; prohibiting disclosure of names, addresses, and telephone numbers of 19,000 hog farmers who signed petition that was submitted to agency concerning controversial program; substantial privacy interest in a secret ballot overrides "slender" public interest in oversight of petition-verification process.

Physicians Comm. for Responsible Medicine v. Glickman, No. 99-3107, 2000 U.S. Dist. LEXIS 14477 (D.D.C. Sept. 30, 2000) -- ordering disclosure of identities of individuals considered for, but not appointed to, a federal advisory committee.

Warren v. Social Security Admin., No. 98-0116, 2000 WL 1209383 (W.D.N.Y. Aug. 22, 2000) -- protecting identities of unsuccessful applicants for paralegal position.

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Exemption 7

Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) -- holding that an investigation into prosecutorial misconduct was for law enforcement purposes because "an agency investigation of its own employees is for law enforcement purposes . . . if it focuses directly on specifically alleged illegal acts, illegal acts of a particular identified official, [and] acts which could, if proved, result in civil or criminal sanctions."

Exemption 7(A)

Maydak v. United States Dep't of Justice, 218 F.3d 760 (D.C. Cir. 2000), reh'g en banc denied, No. 98-5492 (D.C. Cir. Oct. 30, 2000), stay granted (D.C. Cir. Nov. 29, 2000) -- refusing to allow agency to rely on exemptions not previously "substantiated" after it withdrew reliance on Exemption 7(A) due to changed circumstances; ordering disclosure of grand jury records, attorney work product, and law enforcement records without redaction.

Boyd v. United States Marshal Serv., No. 99-2712, 2000 U.S. Dist. LEXIS 14025 (D.D.C. Sept. 25, 2000) -- refusing to "engage in academic exercise" of adjudicating applicability of Exemption 7(A), which applied during the administrative processing of the request but had not applied since.

Exemption 7(C)

Accuracy in Media, Inc. v. National Park Serv., 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 120 S. Ct. 1966 (2000) -- protection of death scene and autopsy photographs of Deputy White House Counsel Vincent Foster; finding "powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence"; recognizing interest against the display of "ghoulish materials" asserted by "spouse, parents, and children of the deceased is one of privacy--even though the holders of the interest are distinct from the individual portrayed."

Fiduccia v. United States Dep't of Justice, 185 F.3d 1035 (9th Cir. 1999) -- following Reporters Committee to protect details of searches of two individuals' homes even though FBI disclosed to press in 1988 that it had searched home of first individual and second individual told the press that FBI searched her home; "[t]hat the FBI itself had publicized its search of [the first individual's] house did not take away his interest in not having the publicity repeated years later or expanded upon"; "[i]t was a long time ago when [the second individual] herself publicized the search of her house, and she might not be indifferent to whether the FBI disclosed what was in its files."

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Chasse v. United States Dep't of Justice, No. 1:98-CV-208 (D. Vt. Jan. 14, 1998) (magistrate's report and recommendation), adopted (D. Vt. Feb. 9, 1999), aff'd on other grounds sub nom. Devine v. United States Dep't of Justice, 202 F.3d 547 (2d Cir. 2000) -- Privacy Act wrongful disclosure lawsuit; disclosure of summary of IG's investigation concluding that senior INS officials "deceiv[ed] members of a Congressional Task Force" was required by FOIA; "public interest in disclosure here is at its zenith because [the summary] reflects the core purpose of FOIA"; officials' "privacy interests, on the other hand, are low because they are high-level officials."

#### Exemption 7(D)

Hale v. United States Dep't of Justice, 226 F.3d 1200 (10th Cir. 2000) -- implied assurances of confidentiality under Landano found in murder-kidnaping investigation based on detailed agency showings of some sources' reasonable fears of retribution and other sources' close relationship with perpetrator or with victim.

Mays v. DEA, No. 99-5334, 2000 WL 1844599 (D.C. Cir. Dec. 26, 2000) -- implied assurance of confidentiality found for source who provided information to a local sheriff's office concerning plaintiff's drug-trafficking activities; an implied promise of confidentiality may be inferred because of the "violence and risk of retaliation that attend this type of crime"; "an informant is at risk to the extent that the criminal enterprise he exposes is of a type inclined toward violent retaliation".

#### Procedural Issues

Electronic Privacy Info. Ctr. v. United States Dep't of Justice, No. 00-1849 (D.D.C. Aug. 2, 2000) (hearing transcript) -- expedited processing; denying as moot plaintiff's motion for temporary restraining order seeking expedited processing of request for FBI's "Carnivore" e-mail surveillance system; holding that the "as soon as practicable" statutory standard does not mean "immediately" or "as soon as possible"; ordering agency to submit report to court in ten days setting out schedule of when it will be able to begin producing documents.

Al Fayed v. CIA, No. 00-2092 (D.D.C. Sept. 20, 2000), reconsideration denied (D.D.C. Dec. 11, 2000) (appeal pending) -- expedited processing; ruling that requester seeking expedited processing who sued without appealing agency's initial denial has not failed to exhaust administrative remedies because statute permits suit either after denial of request for expedited processing or after denial of appeal; preliminary injunction denied because requester failed to demonstrate a substantial likelihood of success on the merits, that the public interest would be furthered by the injunction, or that he would suffer irreparable injury if it were denied.

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Inner City Press/Community on the Move v. Board of Governors of the Fed. Reserve Sys., No. 98-4608, 1998 U.S. Dist. LEXIS 15333 (S.D.N.Y. Sept. 30, 1998), aff'd, No. 98-9604, 1999 WL 464984 (2d Cir. June 22, 1999) (unpublished order), 182 F.3d 900 (2d Cir. 1999) (table cite) -- personal records; notes taken by agency associate general counsel of conference call between agency staff and representatives of two corporations held "personal records" where he "took the notes on his own initiative, and neither shared them with other agency employees nor placed them in agency files[, even though] they may have furthered [the] performance of his agency duties by aiding his recollection of the call."

Valencia-Lucena v. United States Coast Guard, 180 F.3d 321 (D.C. Cir. 1999) -- adequacy of search; agency did not conduct reasonable search for missing pages of Coast Guard cutter log-book because it did not contact ship's captain about what might have happened to pages that evidently had been in captain's possession at requester's criminal trial.

Schladetsch v. HUD, No. 99-0175 (D.D.C. Apr. 4, 2000) -- electronic search and retrieval of requested records that would require 185 hours and cost \$14,041 held not to "significantly interfere with the operation of the agency's automated information system" even though agency's available resources were "stretched to the limit in keeping up with [its] current requirements"; facts that much of information sought is publicly available elsewhere and that compliance would serve only requester's business interests held not relevant as to whether such programming would require more than "reasonable efforts."

OSHA DATA/C.I.H., Inc. v. United States Dep't of Labor, 220 F.3d 153 (3d Cir. 2000) -- fees; \$1.7 million cost of "presdisclosure notification and evaluation" ruled part of "initial examination," thus properly categorized as "review costs"; agency "acted appropriately in concluding that it had 'reason to believe that disclosure of the information could reasonably be expected to cause competitive harm.'"

Judicial Watch, Inc. v. Department of Justice, No. 00-1396, 2000 U.S. Dist. LEXIS 17051 (D.D.C. Nov. 16, 2000) -- fees and fee waiver; ruling that the de novo standard of review, rather than the "arbitrary and capricious" standard, applies to decisions as to which fee category fits a FOIA requester; while observing that the amended FOIA had not "anticipated the evolution of the Internet or the morphing of the 'news media' into its present indistinct form," finding that the requester is a representative of the news media and as such should be granted a "waiver" of search fees; denying the requester a waiver of duplication fees, because it has not demonstrated that "the disclosure of the information is in the public interest."

Hamilton Sec. Group Inc. v. HUD, 106 F. Supp. 2d 23 (D.D.C. 2000) (appeal pending) -- holding that requester failed to exhaust its administrative remedies when it filed its administrative appeal one day after the 30-day regulatory time period from the date of the denial letter.

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Rockwell Int'l Corp. v. United States Dep't of Justice, No. 99-5218 (D.C. Cir. Jan. 5, 2001) -- waiver; finding no waiver of Exemption 5 through disclosure to congressional subcommittee under conditions of confidentiality.

Trans-Pac. Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999) -- "reasonably segregable" requirements; accepting that disclosure of importers' 10-digit Harmonized Tariff Numbers would cause substantial competitive harm, but remanding for district court findings on whether numbers could be segregated by disclosing only first four or six digits--even though requester failed to raise segregation issue administratively or in district court.

Jefferson v. Reno, No. 96-1284 (D.D.C. Mar. 29, 2000) -- sanctions; fine of \$10,000 imposed against agency due to agency's failure to comply with court order; attorney fees awarded to compensate requester for time spent monitoring agency's reconstruction and production of responsive records that were destroyed by prosecutor after FOIA request was received; court referral of matter to Justice Department's Office of Professional Responsibility for investigation of attorney responsible for destruction of records.