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Washington Focus: The Senate has approved an amendment sponsored by Sen. Patrick Leahy (D-VT) to S. 3187, a bill to amend the Food, Drug, and Cosmetic Act. A provision of the bill originally allowed the FDA to deny access to information relating to drugs obtained from a federal, state, local, or foreign government agency, if the agency requested the information be kept confidential. Leahy's amendment limits the scope of the provision to information voluntarily provided by foreign governments. It requires further that the request for confidentiality be in writing and sets a three-year time limit unless the foreign government specifies a different time frame.

Unpublished Bay of Pigs History Protected by Exemption 5

In a decision that single-handedly makes a mockery of all of President Obama's elegant words supporting greater transparency, Judge Gladys Kessler has ruled that an unpublished volume in a multi-volume CIA history of the Bay of Pigs operation need not be released because it is completely protected by the deliberative process privilege. The National Security Archive requested Volumes I, II, IV and V in August 2005. Although the agency acknowledged the requests one month later, the NSA heard nothing more from the CIA until it filed suit in July 2011. A perplexed Kessler observed that "the CIA has offered no explanation as to why it failed to provide any materials to the NSA in the five years and seven months that elapsed between acknowledgment of the FOIA requests and the filing of this lawsuit, but was able to release extensive materials three months after this lawsuit was filed." The agency released three volumes with minimal redactions, but withheld Volume V under Exemption 5. In a footnote, Kessler explained that "because, for the reasons given below, the entirety of Volume V is covered by Exemption 5, there is no need to address the applicability of Exemption 1 or 3," which the agency had invoked to cover some portions of Volume V.

The agency told Kessler that former CIA historian Jack Pfeiffer was "tasked during the 1970s and 1980s with preparing a classified history of the Bay of Pigs Operation. Two chapters from Pfeiffer's 1981 draft fourth volume, which addressed the

Inspector General's report for the Bay of Pigs Operation and the Directorate of Plans' response to that report, became the first draft of Volume V, which covers the Internal Investigation of the Bay of Pigs Operation. Despite multiple drafts, Pfeiffer's supervisor, then Chief Historian Dr. J. Kenneth McDonald, found serious deficiencies with Pfeiffer's proposed Volume V, and therefore it never moved beyond the first stage of the CIA's review process."

Kessler then, in what would appear as an almost insurmountable obstacle for the National Security Archive, pointed out that Pfeiffer himself has requested Volume V after he retired from the CIA and Judge John Pratt had agreed with the agency in *Pfeiffer v. CIA*, 721 F. Supp. 337 (D.D.C. 1989), that the report was protected by the deliberative process privilege. With that decision clearly in hand, Kessler noted that "this Court finds no reason to depart from Judge Pratt's sound conclusion. Volume V was undoubtedly 'generated before the adoption of an agency policy,' and is therefore predecisional. Volume V represents only the first step in a multi-step process of creating an official CIA history. As the current Chief Historian for the CIA, Dr. David S. Robarge, explains Volume V did not even pass through the first stage of a multilayer review process."

She indicated that "Volume V represents a proposal by a subordinate member of the history staff—a proposal which was rejected by the Chief Historian due to significant deficiencies. Volume V was therefore generated prior to and in preparation for completion of the CIA's official history, i.e., its final policy, but was rejected for inclusion in the final publication and remained a draft."

Kessler then concluded that Volume V was deliberative as well. "Volume V represents an intermediate step in the CIA's intensive review process. Further, in the view of Pfeiffer's superiors, Volume V contained significant problems, including 'offer[ing] a polemic of recriminations against CIA officers who later criticized the operation' and was therefore unfit for publication. Hence, Volume V 'reflect[s] the personal opinions of the writer rather than the policy of the agency.'"

The agency also explained why disclosure would harm the deliberative process. Robarge told Kessler that "releasing a draft history may cause staff historians not 'to reach—or even propose—judgments that may be critical of the Agency's performance or otherwise unpopular within the Agency.' Disclosure of a draft history would risk public release of inaccurate historical information. The CIA has also explained why release of Volume V, in particular would cause harm. Specifically, while Pfeiffer's approach may have had it deficiencies, it clearly contained controversial opinions and therefore '[d]isclosure of Volume V would have a chilling effect on CIA's current historians who would henceforth be inhibited from trying out innovative, unorthodox or unpopular interpretations in a draft manuscript.'"

The National Security Archive argued that the passage of time favored disclosure. But Kessler indicated that "the NSA does not, however, cite any case supporting the notion that a document becomes less predecisional or deliberative over time. More importantly, the CIA has shown why, in this case, the passage of time has not affected the rationale for invoking Exemption 5: the CIA does not want to discourage disagreement, of which there was clearly much in this instance, among its historians." She added that "given the fact that, as an agency, the CIA operates in secrecy and faces relatively little public scrutiny of its operations for that reason, and given the importance of the activities and operations it undertakes, it is particularly important that in-house historians—who do have the facts—feel free to present their views, theories, and critiques of the Agency's actions."

Although her reasons for concluding that Volume V needs to remain secret seem quite weak, Kessler's analysis of the law is probably right, particularly in light of the 1989 *Pfeiffer* decision allowing the agency to withhold the exact same document. But government agencies can be right on the law and, at the same time, completely wrong on policy. From the beginning of his administration, Obama has preached a gospel of

transparency that posits that disclosure should typically trump withholding, particularly where there is no foreseeable harm in disclosure. One of the worst aspects of the deliberative process privilege is that once its legitimacy is recognized, its entire purpose is to protect the process rather than the substance of decision-making. If the process is considered sacrosanct, then, of course, any records created as a result of that process must require exemption. But much of our ability to understand how government works comes from a more complete understanding of how decisions were made and why they were made one way rather than another. Volume V of the Bay of Pigs Operation history certainly strikes the CIA as a document that needs protection. But regardless of whether it is a completely accurate presentation of what happened, it is a crucial piece of one of the most notorious chapters in U.S. cold war history. To think that this kind of document needs to be protected in perpetuity to preserve the sanctity of the deliberative process privilege is to seriously short-change our understanding of our own history. (*National Security Archive v. Central Intelligence Agency*, Civil Action No. 11-724 (GK), U.S. District Court for the District of Columbia, May 10)

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

Florida

A court of appeals has ruled that the trial court erred when it found that Orange County Animal Services did not have to pay Susan Hewlings attorney's fees because it had responded to her request. Hewlings requested a copy of a dangerous dog investigation of her dog. Hewlings received a voicemail from the County that day acknowledging receipt of her request. After hearing nothing further from the County for a week, Hewlings' attorney contacted the County and was told a response would be made that day. Three days later, her attorney received a faxed letter saying the County intended to comply with the request and indicating that Hewlings should arrange a time within the next 14 days to come review the records and designate which pages she wanted copied. Hewling responded by letter, explaining that because she wanted the entire report she did not need to review the records in person. After hearing nothing further from the County, Hewlings filed suit and the court ordered the County to release the report within 48 hours, which it did. But the court denied her request for attorney's fees and found the County had fulfilled its obligation to respond by contacting Hewlings by voicemail and several faxed letters. Before the appeals court, Hewlings argued the County had not responded before she instituted an enforcement action. The appellate court agreed, noting that "the mere fact that the County quickly responded to Hewlings' request was not dispositive of whether the County unjustifiably delayed in complying with her request. As such, the trial court's ruling that Hewlings was not entitled to recover attorney's fees because the County responded to her request was erroneous." (*Susan Hewlings v. Orange County Animal Services*, No. 5D11-2715, Florida District Court of Appeal, Fifth District, May 18)

Kentucky

The Attorney General has ruled that Campbell County Public Library Director J.C. Morgan may take six months to respond to a request for all his email, which totaled 22,117 records. The AG noted that "we do not endorse such a delay under *any* circumstances other than the *extreme* circumstances presented in this appeal." The AG added that "while [Morgan] has made a commitment to complete the task by the earliest possible date, and to dedicate his efforts to that end, he has not committed, and cannot responsibly commit, to dedicate every working hour to the fulfillment of [the plaintiff's] request." But the AG criticized Morgan for

ACCESS REPORTS

his poor recordkeeping. The AG pointed out that "had library staff engaged in proper records management, consistent with guidance and training available through the Kentucky Department for Libraries and Archives, the volume of responsive emails, and corresponding burden to produce them for inspection under the Kentucky Open Records Act, would have been significantly decreased." (Order 12-ORD-097, Office of the Attorney General, Commonwealth of Kentucky, May 16)

Michigan

A court of appeals has ruled that a financial review team, appointed by the governor to review the financial condition of municipalities, is not subject to the Open Meetings Act. The court noted that "the authority and functions of a financial review team under the Emergency Financial Manager Act do not empower a financial review team to independently 'govern' through decision-making that effectuates or formulates public policy. A financial review team cannot act 'upon' its recommendations; it can only *make* such recommendations. As a consequence, we conclude that the Detroit Financial Review Team is not a 'governing body' and, therefore, not a 'public body' within the meaning of the Open Meetings Act." The court added that "the fact that a financial review team can hire outside experts, has the power, under certain circumstances, to issue subpoenas and administer oaths to certain enumerated individuals and entities, and can, under certain circumstances, file an action in a circuit court to compel testimony and the furnishing of records and documents does not change our conclusion. These functions are ancillary to the investigative function. . . Again, such functions are not 'governing' by independent decision making that effectuates or formulates public policy." (*Robert Davis v. City of Detroit Financial Review Team*, No. 309218 and No. 309250, Michigan Court of Appeals, May 21)

New Hampshire

The supreme court has agreed with the trial court's ruling that the New Hampshire Local Government Center did not waive attorney-client privilege when it discussed privileged information during a meeting open to the public. Professional Fire Fighters of New Hampshire argued the Center could not have reasonably believed that the information discussed during meetings open to the public was confidential. But the court pointed out that no member of the public attended the meetings and noted that "because the ultimate touchstone is the speaker's reasonable expectation that the communications were made *in confidence*, the fact that the meetings were technically open to the public [under the Right-to-Know Law] is of no import. . . LGC could have reasonably relied on the absence of public attendees to ask for the candid advice of counsel. Had members of the public been present, the conversation could have progressed differently. Thus, because no third persons were present at the meeting, LGC was not required to take any further precautions—such as entering into executive session—to ensure the communications were private." (*Professional Fire Fighters of New Hampshire v. New Hampshire Local Government Center*, No. 2011-550, New Hampshire Supreme Court, May 11)

New Jersey

A court of appeals has agreed with the trial court that documents prepared by private attorney David Sufrin, who represented several Longport officials and residents sued by Martin O'Boyle, were protected by the common interest doctrine when provided to the Borough of Longport for its use in litigation brought by O'Boyle. The court noted that "Sufrin's clients and these defendants also share a common interest. Over a course of years, Sufrin's clients have been sued by plaintiff as a result of their connection with the borough, borough governance, and its elected officials. Longport reasonably anticipated future litigation. The communications between counsel, including the CDs, were generated incidental to pending and anticipated litigation. These materials advanced a common interest, i.e., the defense of litigation spanning several years

initiated by plaintiff related to his ongoing conflicts with Longport and individuals associated with the municipality." (*Martin E. O'Boyle v. Borough of Longport*, No. A-2698-10T2, New Jersey Superior Court, Appellate Division, May 21)

Ohio

The supreme court has affirmed an appeals court ruling finding that the identities of two Cincinnati police officers involved in a shootout with members of the Iron Horsemen motorcycle gang were protected by a constitutional right of privacy recognized by the federal Sixth Circuit in *Kallstrom v. Columbus*, 136 F.3d 1055 (6th Cir. 1998), and adopted by the state supreme court in *Keller v. Cox*, 707 N.E. 2d 931 (1999). The Cincinnati *Enquirer* argued that *Kallstrom* did not apply because there was no evidence that disclosure to the newspaper posed a danger to the police officers. But the supreme court disagreed, noting that "the mere fact that the requesting party did pose a threat did not require disclosure of the personal information sought." The court added that "the evidence here. . .included credible evidence of a perceived likely threat that the Iron Horsemen motorcycle gang would retaliate against the wounded officers for killing the gang's national enforcer." The *Enquirer* asserted that the journalist exception, which allows journalists to get certain information about police officers, applied. The court pointed out the newspaper waived that argument by agreeing in the court of appeals that it did not need address information for the officers. The court observed that "any rights that the Enquirer has under [the journalists' exception] cannot prevail over the officers' constitutional right of privacy." (*State ex rel. Cincinnati Enquirer v. Craig*, No. 2012-Ohio-1999, Ohio Supreme Court, May 10)

A court of appeals has ruled that the Corporation for Findlay Market of Cincinnati is subject to the Public Records Act, but that information about the rents paid by tenants was protected by the trade secrets exemption. Acknowledging that whether such a corporation was subject to the Public Records Act was based on the functional-equivalency test, the court initially indicated that the market was neither a traditional governmental function nor did the City of Cincinnati exercise day-to-day control of its operations. But the court agreed that the corporation was created at the request of the City and that nearly half of its funding came from the City. The court found the Corporation did not qualify as a public agency under the functional-equivalency test. But the court found the Corporation was an entity responsible for creating public records through licensing agreements with the City. The court pointed out that the Corporation's records "are created to carry out the city's responsibilities, the city is able to monitor [the Corporation's] performance and the city has access to the license agreements, under the management agreement, for this purpose." As to the rents, the court indicated that "the confidentiality of these provisions provides [the Corporation] with a competitive advantage in negotiating with current and prospective [tenants], this is an economic benefit. The term and rent provisions of the license agreements are, therefore, trade secrets [under the Public Records Act]." (*State of Ohio ex rel. Kevin P. Luken v. Corporation for Findlay Market of Cincinnati*, No. C-100437, Ohio Court of Appeals, First District, May 11)

Washington

A court of appeals has ruled that the Washington State Department of Transportation properly relied on a U.S. Coast Guard regulation protecting the confidentiality of drug tests administered to maritime workers after an accident in withholding the results of drug tests given to crew members of a state-operated ferry. Although the WSDOT provided much of the information concerning the accident, it refused to disclose individual test results, citing 49 C.F.R. Section 40.321, which implements provisions of 49 U.S.C. 5331. The court noted that "the directive in 49 U.S.C. 5331, requires the Secretary [of Transportation] to prescribe regulations that protect the confidentiality of employee post-accident drug and alcohol test results, without the

ACCESS REPORTS

employee's consent. Accordingly, we hold that the confidentiality protections directed by the federal statute that are implemented in the federal regulation amount to an 'other statute' exemption under the [Public Records Act's] disclosure requirements." The court rejected the agency's claim that the federal regulation preempted the PRA. Instead, the court noted that "the underlying federal statute here expressly supersedes only 'inconsistent' state provisions. . .[T]he federal regulation here prohibits disclosure of only specific information (individual test results), rather than entire records. Thus, other information that is unprotected by the federal regulation may be disclosed under the PRA." Because the agency had admitted that it initially applied the federal regulation too broadly, the court agreed that it was liable for daily penalties until the time it had disclosed further information. The court also found this admission on the part of the agency made it liable for proportional attorney's fees. (*Freedom Foundation v. Washington State Department of Transportation, Division of Washington State Ferries*, No. 41198-9-11, Washington Court of Appeals, Division 2, May 10)

The Federal Courts…

The D.C. Circuit has ruled that the National Security Agency properly issued a *Glomar* response neither confirming nor denying the existence of records concerning any contact with Google pertaining to a cyber-attack on the Gmail accounts of Chinese human rights activists under both **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Google Vice President David Drummond publicly indicated that the company had changed its privacy settings as a result of the incident, notified other companies that might have been targeted, and was "also working with relevant U.S. authorities." Former NSA Director Mike McConnell was quoted in the *Washington Post* that collaboration between NSA and private companies liked Google was "inevitable." As a result of these reports, EPIC requested all records and communications between NSA and Google concerning cyber security. When the agency issued a *Glomar* response, EPIC filed suit. The district court agreed with the agency and EPIC appealed. Noting that "NSA need not make a specific showing of potential harm to national security to justify withholding information under Section 6 [of the National Security Agency Act] because 'Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful,'" The D.C. Circuit observed that "the only question is whether the withheld material satisfies the criteria of the exemption statute, *i.e.*, whether acknowledging the existence or nonexistence of the requested material would reveal a function or activity of the NSA." EPIC argued it was seeking records about unsolicited communications from Google that were not protected by Section 6. The agency responded that "if NSA disclosed whether there are (or are not) records of a partnership or communications between Google and NSA regarding Google's security, that disclosure might reveal whether NSA investigated the threat, deemed the threat a concern to the security of U.S. Government information systems, or took any measures in response to the threat. As such, any information pertaining to the *relationship* between Google and NSA would reveal protected information about NSA's implementation of its Information Assurance Mission." The court agreed with the agency, noting that "the existence of a relationship or communications between the NSA and a private company certainly constitutes an 'activity' of the agency subject to protection under Section 6. Whether that relationship—or any communications pertaining to the relationship—were initiated by Google or NSA is irrelevant to our analysis. Even if EPIC is correct that NSA possesses records revealing information *only* about Google, those records, if maintained by the agency, are evidence of some type of interaction between the two entities, and thus constitute an NSA 'activity' undertaken as part of its Information Assurance mission, a primary 'function' of the NSA." EPIC also argued that the agency's relationship with Google was not classified and was public knowledge. The court pointed out that this made no difference. "The language of the NSA Act, however, does not distinguish between the agency's various missions, and does not invite this Court to do so. Rather, the statute broadly exempts *any* information pertaining to the agency's 'activities' or 'functions.'" The court added that "the fact that limited information regarding a clandestine activity has been released does not mean that all such

information must be released." EPIC also argued that the agency was required to search for records and conduct a **segregability** analysis before issuing a *Glomar* response. However, the court disagreed, noting that when an agency issued a *Glomar* response it was in essence claiming that there were no relevant records to examine. The court observed that "because we find [the agency's declaration] sufficient to support NSA's *Glomar* response, requiring NSA to conduct a search and segregability analysis would be a meaningless—not to mention costly—exercise." (*Electronic Privacy Information Center v. National Security Agency*, No. 11-5233, U.S. Court of Appeals for the District of Columbia Circuit, May 11)

Judge John Bates has ordered the Defense Department to submit three video recordings of detainees at Guantanamo Bay for ***in camera*** **review** after finding the agency had failed for a third time to justify why it was withholding them. Bates explained that "the Court had ordered the Department to 'subdivide the recordings into manageable parts cross-referenced to the relevant portion of the claimed exemption.' Although the Department has attempted to do so, its characterizations of those sub-parts are inconsistent and confusing. In addition, the Department's *Vaughn* indices and declarations also provide no illumination as to the actual lengths of the video, when certain segments begin and end, or how long such subdivided segments run." He pointed out that the agency had provided some corrections, but noted that "the problem here, however, is that these attempts by the Department to 'correct' or supplement prior submissions have resulted in further obfuscations, making it difficult for the Court to consider the validity of the Department's claimed exemptions and hampering [the plaintiff's] ability to respond consistently to the Department's arguments." He added that "none of these statements, however, account for why images of the detainee—which are responsive to [plaintiff's] request—could not be reasonably segregated from exempt and non-responsive portions of the videos." He then pointed out that "the written submissions provided by the Department simply do not allow the Court meaningfully to assess whether the claimed exemptions actually apply. At this juncture, then, given the multiple opportunities the Department has received to supplement its declarations and *Vaughn* indices, and the lack of clarity and consistency that nevertheless persist in those submissions, the Court finds it appropriate to order *in camera* review." Ordering the agency to provide three video recordings, Bates observed that "given that the information [the plaintiff] requests is images of detainees on the videorecordings, the Court finds its necessary to test these assertions by viewing a representative sampling of the videos themselves." The plaintiffs had argued that the agency failed to search an alternative spelling of a detainee's name. Bates ordered the agency to conduct another search "because the Department has not provided a satisfactory response to [the plaintiff's] contention that it should have searched for records using an alternative spelling of the name that [the plaintiff] discovered from the Department's own records." However, as to requiring a new search of its detainee videos, Bates agreed with the agency that those records were indexed by specific designators and would not be likely to contain alternative spellings. (*International Counsel Bureau and Pillsbury, Winthrop, Shaw, Pittman, LLP v. United States Department of Defense*, Civil Action No. 08-1063 (JDB), U.S. District Court for the District of Columbia, May 23)

The Second Circuit has ruled that the government properly withheld portions of two Office of Legal Counsel memos concerning torture as well as videotapes of interrogations and a photo of Abu Zabaydah taken while he was in CIA custody under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. The case involved multiple requests from the ACLU and other public interest groups for records concerning detainees. District Court Judge Alvin Hellerstein had previously ruled that the OLC memos were not protected because they concerned legal authority for interrogations rather than confidential sources. Hellerstein had also ultimately decided that there was no point in sanctioning the CIA for destroying the 92 videotapes, and that the photo of Abu Zabaydah revealed information that was properly classified. The court noted that the OLC memos were properly redacted because "it pertains to an intelligence source." The court

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explained that "we reject the district court's suggestion that certain portions of the redacted information are so general in relation to previously disclosed activities of the CIA that their disclosure would not compromise national security. It is true that the Government has disclosed significant aspects of the CIA's discontinued detention and interrogation program, but its declarations explain in great detail how the withheld information pertains to intelligence activities unrelated to the discontinued program." The court rejected Hellerstein's instruction to the government to substitute neutral phrases in the OLC memos, noting that "FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records." The court added that "the district court erred in 'second-guessing' the executive's judgment of the harm to national security that would likely result from disclosure, by crafting substitute text that—in its own view—would avoid the harm that could result from disclosure of the information in full." The court also faulted Hellerstein for relying on the Classified Information Procedures Act for guidance in determining how to release sensitive information. The court observed that "contrary to the district court's assertion, CIPA applies exclusively to criminal cases." The plaintiffs argued that because President Obama had stated that waterboarding was illegal it therefore exceeded the CIA's mandate and could not qualify as an intelligence method. The court pointed out that "even if we assumed that a President can render an intelligence method 'illegal' through the mere issuance of public statements. or, more formally, through adoption of an executive order, and we further assumed that President Obama's Executive Order coupled with his statements describing waterboarding as 'torture' were sufficient in this regard, we would be left with the difficult task of determining what retroactive effect, if any, to assign that designation. In our view, such an 'illegality' inquiry is clearly beyond the scope and purpose of FOIA." As to the photo of Abu Zubaydah, the court observed that "the image at issue here conveys an "aspect of information that is important to intelligence gathering,' and that this information necessarily 'relates to' an 'intelligence source or method.' The Government's justification for withholding the photograph is thus both 'logical and plausible.'" (*American Civil Liberties Union, et al. v. Department of Defense*, No. 10-4290-cv(L), U.S. Court of Appeals for the Second Circuit, May 21)

Judge Reggie Walton has ruled that the Interior Department did not improperly destroy records subject to a FOIA request when it destroyed in-take forms collected in 2009 during a census to identify aliens who lived in the Commonwealth of Northern Mariana Islands after all the information had been entered into a database. Teresa Kim, the counsel for the Lieutenant Governor of the Commonwealth of Northern Mariana Islands, requested all records generated by the federal ombudsman's office in Saipan pertaining to the census. Walton first addressed Kim's contention that the Interior Department had improperly destroyed the in-take forms. He indicated that "plaintiff has offered no support for the suggestion that the defendant absolutely knew that a FOIA request would be made for production of the census forms, and thus the defendants had no duty to preserve the documents prior to the request that was made for their production . . .[T]he plaintiff made her initial FOIA request on May 4, 2010, which was nearly five months *after* the census in-take forms were 'shredded.' Accordingly, the Court finds that the destruction of the actual census in-take forms was not done in bad faith and therefore does not merit any remedial action being ordered or preclude the Court from finding that the defendant conducted a reasonable search in the absence of such action." Walton then found the agency had conducted an **adequate search**. He noted that "the defendant makes a persuasive argument that the plaintiff's request was very narrow and specific, and the defendant complied with that request." He pointed out that "although the plaintiff couches her challenge to the non-production of the in-take forms as an attack on the adequacy of the search, her primary concern appears to relate to the destruction of documents. . . Despite the fact that the plaintiff is aware that the in-take forms no longer exist. . .the plaintiff continues to bemoan the fact that the documents were destroyed." He observed that "to be sure, it is unfortunate that the documents are no longer available. Nonetheless, the defendant is entitled to summary judgment because its duty of production under FOIA is limited to the production of responsive documents that were in its possession at the time the FOIA request was made." (*Teresa K. Kim v. United States Department of the*

Interior, Civil Action No. 10-1552 (RBW), U.S. District Court for the District of Columbia, May 17)

A federal court in New York has ruled that a classified report to Congress from the Attorney General and the Director for National Intelligence regarding foreign intelligence collection authorized under Section 215 of the Patriot Act is protected under both **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. After Sen. Ron Wyden (D-OR) and Sen. Mark Udall (D-CO) made comments suggesting that the administration was misleading Congress concerning its use of the Section 215, both the *New York Times* and the ACLU filed requests for the report to Congress. When the Justice Department denied the requests, the newspaper and public interest organization sued. Both the *Times* and the ACLU asked Judge William Pauley to review the report *in camera*. Pauley noted that "in view of the Report's brevity, this Court did so. This Court is mindful, however, that 'the district court's inspection prerogative is not a substitute for the government's burden of proof.' Accordingly, the Government must demonstrate that the Report is covered by at least one of FOIA's enumerated exemptions." Pauley found the report was exempt under both Exemption 1 and Exemption 3. Pauley found the report was properly classified and noted that "this Court credits the Government's assertion that disclosing this information could enable America's adversaries to develop means to degrade and evade the nation's foreign intelligence collection capabilities." As to Exemption 3, Pauley agreed the report was protected by the National Security Act and pointed out that "disclosing the Report would reveal and compromise intelligence sources and methods." He rejected the plaintiffs' claim that the report constituted "secret law." Instead, he explained that "to support their 'secret law' theory, the New York Times and the ACLU cite no case in which a court applied the 'secret law doctrine' to mandate the disclosure of classified national security information protected by Exemptions 1 and 3, and this Court has found none. . . Further, there is no textual basis in FOIA for a freestanding 'secret law doctrine.' Notwithstanding the ACLU's policy arguments, this Court declines the invitation to read a 'secret law' exception into the FOIA exemptions without a statutory tether." Addressing the concerns expressed by Wyden and Udall, Pauley observed that "this Court's *in camera* review of the Report verifies the Government's public representations that the Report contains properly classified national security information. The Senators' concerns that the Government is misleading Congress and the public about the scope of section 215 do not compel a different conclusion because the Government meets its burden for withholding the Report under Exemptions 1 and 3." (*The New York Times Co. and the American Civil Liberties Union v. United States Department of Justice*, Civil Action No. 11-6990 (WHP), U.S. District Court for the Southern District of New York, May 17)

A federal court in New Hampshire has ruled that the FAA properly invoked **Exemption 5 (privileges)** to protect a handful of documents concerning the agency's decision to loan equipment to the Government of Bermuda to upgrade its airport radar system. Bermuda hired Sensor Systems to install and maintain the equipment and the company requested information about the decision to lend the equipment to Bermuda. Although the agency disclosed 441 documents in full, the company sued to get access to unredacted copies of the remaining 26 documents. The agency claimed that most of the redacted information was protected by the deliberative process privilege, while other redactions were protected by the attorney-client privilege. The court largely agreed. The court required the agency to submit one document for *in camera* review after finding the agency still had not supported it deliberative process privilege claim. The court noted that the agency's descriptions of the document "merely suggest that the redactions concern a subordinate's account of past events to his superior. Because the FAA has not identified a decision that correlates to the document, it has failed to satisfy the predecisional prong of the deliberative process privilege test." As to another document for which the agency claimed attorney-client privilege, the court pointed out that the agency's affidavit "makes it clear that the email was sent to an agency attorney for the purpose of obtaining legal advice. The fact that [the employee] sent the email only to [the] attorney and did not share it with a third party supports an inference

of confidentiality. . .Although Sensor Systems speculates that [the] attorney may have disclosed contents of the communication to others, pure speculation is insufficient to demonstrate that the attorney-client privilege has been waived." (*Sensor Systems Support, Inc. v. Federal Aviation Administration*, Civil Action No. 10-262-PB, U.S. District Court for the District of New Hampshire, May 11)

Judge Richard Roberts has ruled that Freedom Watch may proceed with the portion of its **Federal Advisory Committee Act** suit against the "Obama Health Reform De Facto Advisory Committee" asking for records and a list of individuals who attended the meetings of the alleged committee. Although the government had consistently argued that no such committee ever existed, Roberts pointed out that if records existed there was still a cause of action against the custodian who had custody of such records. But as to other claims made by Freedom Watch, Roberts noted that "because there are no grounds to find that the alleged committee, even if it did at some point exist, exists at present, the case is moot with respect to Freedom Watch's claims for advance notice of, and the ability to participate in, any future meetings of the OHRDFAC and with respect to its claim for the appointment of 'at least one person with a different point of view' to the committee. On these claims, Freedom Watch has not carried its burden to 'establish by a preponderance of the evidence that the Court possesses jurisdiction' over an ongoing controversy that could be redressed by a favorable decision." (*Freedom Watch, Inc. v. Barack Obama*, Civil Action No. 09-2398 (RWR), U.S. District Court for the District of Columbia, May 15)