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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: National Security Counselors, a public-interest law firm specializing in national security litigation, has sent a letter to the chair and ranking minority member of the House and Senate committees with jurisdiction over FOIA complaining about a recent litigation position taken by the Department of Justice which allegedly minimizes the role of the Office of Government Information Services, housed at the National Archives, in interpreting FOIA. National Security Counselors pointed out that it received a favorable resolution from OGIS pertaining to a request to the CIA, but that DOJ has now said in litigation over the request that OGIS's role is limited to mediation. The letter noted that "DOJ has just stated for the record that OGIS 'just performs mediations,' and in support of this position cites nothing but its own regulations as if a DOJ regulation could supersede the plain language of a statute and the clear will of Congress. This public attempt by the DOJ to convince a federal court to marginalize OGIS and relegate it to an office which 'offers mediation services,' is in direct conflict with both the letter and intent of the OPEN Government Act. . ."

Court Recognizes Constitutional Privacy Right in Autopsy Photos

Basing its decision primarily on the Supreme Court's decision in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), in which the Court found that Clinton counsel Vince Foster's family had a privacy right applicable through Exemption 7(C) (invasion of privacy concerning law enforcement records), the Ninth Circuit has ruled that there is a constitutional right of privacy allowing family members to challenge government dissemination of autopsy photos. Writing for the court, Chief Judge Alex Kozinski explained that "the *Favish* Court considered our history and traditions, and found that 'the well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.' For precisely the same reasons, we conclude that this right is also protected by substantive due process."

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The case involved the 1983 death of Brenda Marsh's two-year-old son Phillip Buell from a severe head injury while in the care of her then-boyfriend, Kenneth Marsh. Kenneth Marsh was charged with Phillip's death, but claimed the infant had fallen off the couch and struck his head on the fireplace. Marsh was convicted of second-degree murder and imprisoned. Twenty years later, Marsh filed a habeas corpus petition, which was granted by the San Diego District Attorney. The DA's recently-consulted expert could not conclude beyond a reasonable doubt that Phillip was the victim of child abuse. Marsh's conviction was set aside and he was released. After his release, Marsh sued San Diego County and the medical personnel who performed Phillip's autopsy. Marsh deposed Jay. S. Coulter, the retired former Deputy District Attorney who had prosecuted Marsh in 1983. During the deposition, Coulter revealed that he had photocopied sixteen autopsy photos of Phillip's corpse and kept one of them when he retired. During his retirement, Coulter disseminated the autopsy photo along with a memo he had written entitled "What Really Happened to Phillip Buell?" to a newspaper and a television station. Once Brenda Marsh learned of Coulter's dissemination of her son's autopsy photo, she sued San Diego County and Coulter alleging the copying and dissemination of the photo violated her Fourteenth Amendment due process rights.

Marsh claimed such a right existed as a matter of substantive due process and also as a state-created liberty interest protected by procedural due process. Kozinski first noted that "no court has yet held that this right encompasses the power to control images of a dead family member, but the Supreme Court has come close in a case involving the Freedom of Information Act." In *Favish*, Kozinski observed, "the Court found that the right to 'personal privacy' included the 'surviving family members' right to personal privacy with respect to their close relative's death-scene images.'" He added that "the Court had little difficulty 'finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased family member's remains for public purposes.' "Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.'"

Kozinski admitted that "so far as we are aware, then, this is the first case to consider whether the common law right to non-interference with a family's remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected. We conclude that it is." Kozinski explained that "the long-standing tradition of respecting family members' privacy in death images partakes of both types of privacy interests protected by the Fourteenth Amendment. First, the publication of death images interferes with 'the individual interest in avoiding disclosure of personal matters. . .' Few things are more personal than the graphic details of a close family member's tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent's suffering during his final moments—all matters of private grief not generally shared with the world at large." He added that "a parent's right to choose how to care for a child in life reasonably extends to decisions dealing with death, such as whether to have an autopsy, how to dispose of the remains, whether to have a memorial service and whether to publish an obituary. Therefore, we find that the Constitution protects a parent's right to control the physical remains, memory and images of a deceased child against unwarranted exploitation by the government."

Kozinski next pointed to a California law protecting individuals against the dissemination of autopsy photos. He noted that "it's clear that this law was intended to create a liberty interest in a family member's death images." Examining Coulter's reasons for retaining and disseminating a copy of the autopsy photo, Kozinski indicated that it was debatable whether or not Coulter had a legitimate reason to keep the photo to use in training seminars. But as to his dissemination to the press, Kozinski observed that "Coulter's submission of the autopsy photograph to the press after he retired was not for legitimate law enforcement, criminal investigation, or educational purposes. . .Coulter's interest in being vindicated in the court of public opinion is

not the type of use that the [California law] exempts. Marsh sufficiently alleges a violation of [the state law] and, therefore, a deprivation of a state-created liberty interest."

But Kozinski found that because Coulter was not a government official when he disseminated the photo to the press, Marsh had failed to show the action was under color of state law. However, he pointed out that Coulter's decision to photocopy and retain the photo while he was still a deputy district attorney was sufficient to show state action. Marsh relied on *Favish* as proof that the right to control the dissemination of autopsy photos was clearly established in law. However, Kozinski noted that "but [*Favish*] was decided after Coulter retired in 2000. Therefore, [it was] not established at the time Coulter was acting under color of state law." Dismissing Marsh's claim, Kozinski pointed out that "while we believe the right is sufficiently grounded in federal law, we can't fault a state actor for failing to anticipate our ruling. Because it wouldn't have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted,' Coulter is entitled to qualified immunity." (*Brenda L. Marsh v. County of San Diego*, No. 11-55395, U.S. Court of Appeals for the Ninth Circuit, May 29)

Views from the States…

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

Connecticut

A court of appeals has upheld a ruling by the FOI Commission finding that the Town of Old Saybrook did not have an obligation to transcribe voice mail messages Lamberto Lucarelli left on the police department's telephone, but that the Town should turn over a voice mail message tape-recorded by a police officer. Lucarelli asked for any records about himself and the police produced four incident reports. However, he believed the department had more records, including voice mail messages had had left on the department's phone. The court noted that a provision of the FOIA relieved agencies from any obligation to transcribe voice mail messages. But the court agreed with the Commission's ruling concerning the message recorded by a police officer in which the Commission "determined that plaintiff was entitled to a voice mail message that had been tape recorded by [the officer] and ordered the department to provide the plaintiff with a copy of that message and to make a diligent search for tape recordings of any additional voice mail messages." (*Lamberto Lucarelli v. Freedom of Information Commission*, No. 33336, Connecticut Appellate Court, May 29)

A court of appeals has ruled that the FOI Commission properly dismissed a complaint by Kimberly and Anthony Lazzari challenging the refusal of the Department of Children and Families to provide them records concerning themselves and their minor children. Although the Lazzaris argued that the confidentiality provision covering child protective records applied only to third parties, the court found the Commission was correct in relying on earlier decisions concluding that all such records were confidential. The court noted that "the commission properly dismissed the plaintiffs' complaint without a hearing for the stated reason that it did not have jurisdiction to determine rights of access under [the FOIA} to the department's records on child protection activities." (*Kimberly Albright-Lazzari, et al. v. Freedom of Information Commission*, No. 33444, Connecticut Appellate Court, June 5)

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Illinois

The federal Seventh Circuit has ruled that the Chicago Tribune Company did not have standing to challenge the University of Illinois' interpretation that the Federal Educational Rights and Privacy Act applied to records showing a pattern of favoritism in admissions. The *Tribune* ran an investigative series in 2009 entitled "Clout Goes to College," in which the paper revealed that the University of Illinois had a special process for reviewing applications of persons with well-placed supporters. When the paper followed up its reporting with a series of Illinois FOIA requests to the University, the University denied its requests on the basis that FERPA and its implementing regulations prohibited the disclosure of student-identifying information. Chief Judge Frank Easterbrook pointed out that "the Tribune's claim of access to these documents arises under Illinois law, so one would have expected the next step to be a suit in state court. The parties are not of diverse citizenship, and anyway it is not possible to sue an arm of state government in federal court to vindicate a claim under state law. Yet instead of seeking the documents through state litigation, the Tribune asked a federal district court for a declaratory judgment after concluding that the phase 'prohibited from disclosure by federal or State law' means only statutes that directly forbid disclosure." Although at the appellate level, the parties argued that the federal question doctrine supplied jurisdiction, Easterbrook explained that "the University may have a federal defense to the Tribune's claim, but it is black letter law that a federal defense differs from a claim arising under federal law." He added that "the Tribune is the natural plaintiff and cannot use the declaratory-judgment statute to have a federal court blot out a potential federal defense to its own potential state-law suit." He then noted that "here, the claim for the documents arises under state law, and *only* state law; the Tribune's request for the information does not depend on even a smidgeon of federal law. No federal agency's decision has been contested. The University has a potential defense [under FERPA], but even that may depend on state rather than federal law." Easterbrook concluded that "because the Tribune's claim to the information arises under Illinois law, the state court is the right forum to determine the validity of whatever defenses the University presents to the Tribune's request." (*Chicago Tribune Company v. Board of Trustees of the University of Illinois*, No. 11-2066, U.S. Court of Appeals for the Seventh Circuit, May 24)

Kentucky

The supreme court has ruled that the Bourbon County Board of Education violated the Open Meetings Act when it went into closed session to discuss transitioning the current superintendent into a paid consulting job and then ratified the decision immediately after it reconvened in open session. After 18 months as superintendent, Arnold Carter accepted a consulting job with the County Schools rather than deal with a newly composed Board that was dissatisfied with his job performance. Carter met in closed session with the current Board which was still favorably disposed towards him, as well as the Board's attorney, and came to a general agreement about resigning and becoming a consultant. The Board then reconvened and ratified its discussion. When the Board was sued, it claimed the closed session was permissible under the exceptions for pending litigation and personnel evaluation. Rejecting both claims, the supreme court noted that "the litigation exception does not apply in this case because there was insufficient threat or possibility of litigation. Carter seeks refuge under this exception on the basis that if the Board ever did terminate his employment in violation of his employment contract, he could then consider bringing a suit against the Board. This remote possibility of litigation is not enough to trigger the litigation exception. At no time did Carter ever threaten litigation or intimate he would bring suit if the Board actually took steps necessary to remove him as superintendent." The court found the personnel exception did not apply either. The court pointed out that "the General Assembly determined the specific personnel subjects that can be discussed in closed session and it expressly did not include an employee's resignation." Carter argued that his resignation constituted a "dismissal," which was covered by the personnel exception. But the court noted that "dismissing Carter was never discussed at any of the Board meetings, it was not on any meeting agenda, and the Board never told Carter he would be dismissed

or that such action was even under consideration." The court found Carter's consulting contract was not covered either. The court observed that "Carter's consulting contract could not be discussed in closed session because it concerned hiring Carter as an independent contractor, not as an employee. . .The open meeting exceptions must be strictly construed and the personnel exception specifies that it only applies to 'an individual employee, member or student.,' not to independent contractors." The court found the Board could not ratify its improper decision in a subsequent open session. "No discussion was had, no explanation was offered and there was no opportunity for input or questions from the public. The actions decided upon in the improper closed session could not be ratified by this quick up-and-down vote in open session." While the plaintiffs argued that the Board's improper behavior should be void, the court indicated that "the language in this provision is clear. The General Assembly specifically stated that noncompliant action is 'voidable,' not 'void.' We may not interpret the statute at variance with its stated language." The court concluded that the contract was nullified by the decision of the trial court. As a result, Carter was entitled to whatever he had been paid until that time but was not entitled to any additional payments. (*Arnold W. Carter v. Jaime D. Smith and Bourbon County Board of Education*, No. 2010-SC-000295-DG, Kentucky Supreme Court, May 24)

New York

The Court of Appeals has ruled that the historical importance of records pertaining to the New York City Board of Education's "Anti-Communist Investigations," which included interviews with public school teachers and other employees suspected of membership in the Communist Party, outweighs the privacy interests of individuals identified in the records and should be made available to historian Lisa Harbatkin except where individuals were promised confidentiality. The investigation began in 1936 and ran until 1962. The City offered Harbatkin access to the records on condition that she not publish any names. She declined and sued instead of access under the Freedom of Information Law. The court found the passage of time had diminished the privacy of the subjects of the interviews. The court observed that "today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy. Certainly this was not always true. At the time of the investigations, and for some years thereafter, public knowledge that people were named as present or former Communists would have subjected them to enormous embarrassment, or worse. But that embarrassment would be much diminished today—both because the activity of which they were accused took place so long ago, and because the label 'Communist' carries far less emotional power than it did in the 1950s." The court added that "we do not say that disclosure will be completely harmless to those named in the documents, if they are still alive, or to members of their families who care about their memories. But the diminished claims of privacy must be weighed against the claims of history. The story of the Anti-Communist Investigations, like any other that is a significant part of our past, should be told as fully and as accurately as possible, and historians are better equipped to do so when they can work from uncensored records." But the court concluded that the names of individuals who had been told that no one would find out that they had been interviewed should remain protected. The court indicated that "we find it unacceptable for the government to break [its] promise, even after all these years. . .Perhaps there will be a time when the promise made to [such individuals], and to others similarly situated, is so ancient that its enforcement would be pointless, but that time is not yet." (*In the Matter of Lisa Harbatkin v. New York City of Records and Information Services*, No. 91, New York Court of Appeals, June 5)

Pennsylvania

The supreme court has ruled that vendor records of the SWB Yankees, which runs the Lackawanna County Stadium Authority on behalf of the county government, are subject to the Right-to-Know Law because the SWB Yankees are performing a governmental function. The court pointed out that "some activities which

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conventionally may be couched as proprietary in nature are now being undertaken as governmental functions." This being the case, the court observed that: "We do not see that the government's entry into areas which might more comfortably be associated with the private sector suggests diminished cause for openness. In this regard, it seems unlikely that the Legislature would be naïve about the potential for inappropriate influences which have become a risk attending such ventures. Rather, the nature of these activities, and the departures from the more conventional confines of government, appear to us to militate in favor of public scrutiny." The court added that "a reasonably broad construction of 'governmental function' best comports with the objective of the Right-to-Know Law, which is to empower citizens by affording them access to information concerning the activities of their government." The court indicated that "the Stadium Authority, having been formed to administer an amusement enterprise, generated substantial public indebtedness in such venture. Appellant has accepted delegation of the responsibility to operate the ball park for the public benefit as the Authority's agent. . . .[W]e have no difficulty holding that, where a government agency's primary activities are defined by statute as 'essential governmental functions,' and such entity delegates one of those main functions to a private entity via the conferral of agency status, [the Right-to-Know Law] pertains on its terms to non-exempted records directly relating to the function." (*SWB Yankees LLC v. Gretchen Wintermantel and the Scranton Times Tribune*, No. 44 MAP 2011, Pennsylvania Supreme Court, May 29)

The Federal Courts...

A federal magistrate judge in California has ruled that Gonzales and Gonzales Bonds and Insurance Agency may proceed with its challenge to the Department of Homeland Security's policy requiring FOIA requesters to provide a third-party authorization before a request involving personal information can be processed. The company requested 571 alien files from DHS. The company filed administrative appeals for the first 183 requests rejected on the basis of lack of third-party authorization, but received no response. For the rest of its requests, the company decided it would be futile to appeal based on its previous experience with the agency. The company then filed suit and the agency moved to dismiss the case based on **failure to exhaust administrative remedies**. The company amended its complaint to clarify that its legal challenge was against the agency's policy of denying requests without third-party authorization. The magistrate judge noted that "courts will not apply the administrative exhaustion doctrine to such circumstance, because the party's claim rests upon statutory interpretation—an area of court, rather than agency, expertise." The agency also argued Gonzales and Gonzales had **failed to state a claim** under the Administrative Procedure Act because the statute of limitations for challenging the agency's publication of the policy in the Federal Register had expired in 2009. The magistrate judge agreed that "the statute of limitations for a facial regulatory challenge begins to run when the agency publishes the regulation in the Federal Register, which in this case was January 27, 2003. Plaintiff therefore had until January 27, 2009 to bring its facial challenge before the Court. Plaintiff first raised this claim when it filed is Amended Complaint on March 20, 2012." But, the court pointed out, the company's "as-applied challenge to the regulation, though, faces no such bar. . .DHS made its earliest final determination on Plaintiff's FOIA requests on October 30, 2009 and Plaintiff first raised its as-applied challenge to DHS's use of [the regulations] in making FOIA determinations in the Amended Complaint on March 20, 2012. Plaintiff's as-applied claim thus falls well within the six-year statute of limitations." (*Gonzales and Gonzales Bonds and Insurance Agency, Inc. v. United States Department of Homeland Security*, Civil Action No. 11-02267 DMR, U.S. District Court for the Northern District of California, May 17)

Judge Richard Leon has ruled that the State Department has justified its claim that 19 U.S.C. § 2605(i)1) protected an exchange between archeological professor Danielle Parks and Andrew Cohen of the agency's Bureau of Educational and Cultural Affairs concerning ancient coins. The parties agreed that the

section should be interpreted along the same lines as **Exemption 7(D) (confidential sources)**. Leon noted that "based on the evidence provided by State, that there was a demonstrated expectation of confidentiality between the parties and that the redacted portions of the e-mails have been appropriately withheld under Exemption 3(b)." Even though he contorted the facts, Leon insisted that Parks had requested confidentiality. But he said Cohen "requested that [Parks] 'please be discreet about our conversation," and she replied "of course, not a problem.'" She later pointed out that several people had asked her about the conversation and she had said nothing. The information also related to an upcoming meeting that was closed to the public. Using this explanation, Leon concluded that "these facts, coupled with the concrete textual indications of confidentiality on the face of the e-mails, clearly establish an expectation of confidentiality between the parties." Leon also approved of the agency's **search** for any further emails. He noted that "beginning in October 2009, the State Department implemented an electronic backup system that retains Bureau e-mail communications for only the preceding six months. Any e-mail communication deleted more than six months prior to the time of a FOIA request search would not be retrievable. As such, a renewed search for responsive e-mails in this system would reveal no additional communications not previously uncovered in the initial FOIA searches, and, therefore, is unwarranted." (*Ancient Coin Collectors Guild v. U.S. Department of State*, Civil Action No. 07-2074 (RJL), U.S. District Court for the District of Columbia, May 29)

Judge James Boasberg has ruled that OPM has so far failed to show that it conducted an **adequate search** for records pertaining to any federal employment actions taken as a result of an individual's failure to register with Selective Service. Responding to a request from Leah Nicholls for any records, including appeals, the agency searched its government-wide workforce information database and concluded that no action code existed that would allow the agency to locate information concerning whether an individual was dismissed from federal employment as a result of failure to register with Selective Service. Nicholls argued that the agency's Public Liaison had told her that responsive records might be held by the Federal Investigative Services and that the agency had provided no explanation as to why it did not search there as well. Boasberg noted that "Defendant's Opposition Reply never addresses this point, and OPM offers nothing to dispute Plaintiff's theory beyond a conclusory statement—unsupported by declaration—that 'FIS does not have responsive records.' Defendant's failure to refute Plaintiff's argument that it should have checked with FIS precludes summary judgment on this issue." But Boasberg agreed with the agency that there was no likelihood that responsive records could be found by a further search of its paper records. He observed that "this is particularly true because Plaintiff is seeking aggregate data about types of governmental action—*i.e.*, the sort of information contained in databases—rather than individual records themselves. . .Plaintiff's conjecture that aggregate information might be located in non-electronic records does not undermine the agency's position." Nicholls claimed OPM had interpreted her request for appeals information too narrowly by informing her that there was no appeal right for such a determination. Nicholls said the word "appeal" was "functionally equivalent to the words 'adjudication' and 'reconsideration,' a claim Boasberg indicated was "half right." He pointed out that "OPM reads Plaintiff's request too narrowly. Plaintiff sought documents 'relating to appeals. . .*regarding* the termination, denial of employment, or withdrawal of employment.' She did not, as OPM sometimes suggests in its briefs, request documents related to 'appeals *from*' employment actions. Plaintiff's use of words like 'relating to' and 'regarding' plainly indicate that she sought information about appeals lodged at any point during the process, not only those taken after the relevant employment action. Instances of reconsideration by another authority, whether before or after the termination, are still connected to that termination. OPM thus cannot avoid disclosure on the ground that reconsiderations may have taken place prior to any formal employment action." (*Leah Nicholls v. United States Office of Personnel Management*, Civil Action No. 11-1654 (JEB), U.S. District Court for the District of Columbia, May 29)

A federal court in California has ruled that the Defense Department was entitled to claim **Exemption 1 (national security)** for records it had previously withheld under **Exemption 2 (internal practices and procedures)** because of the Supreme Court's ruling in *Milner v. Dept. of Navy*. The Exemption 2 claims had been before the court since 2008 and in a ruling in a ruling in February, 2012, the court told the agency it could no longer rely on the circumvention prong of Exemption 2, but that the records might be protected by Exemption1. Approving the invocation of Exemption 1, the court noted that "the Court finds that the Supreme Court's decision in *Milner*, to overturn the interpretation of Exemption 2 on which Defendants had relied constitutes an 'interim development in applicable legal doctrine' sufficient to warrant the government's assertion of a belated FOIA exemption." The court also found that later court interpretation of the privacy implications of government email and phone numbers also provided an adequate basis for the agency to withhold those records under **Exemption 6 (invasion of privacy)**. Based on a 2005 district court decision from the D.C. Circuit, the court previously had found such information was not protected. But two subsequent district court decisions from the D.C. Circuit had held that such information was protected. Agreeing with the agency's change in position, the court indicated that in its earlier ruling "the Court relied entirely on a 2005 decision from a court in the District of Columbia in reaching its conclusion regarding Exemption 6. Thus, the Court finds that subsequent changes in the law within the District of Columbia are, in fact, relevant for purposes of reconsideration of the Court's February 2 Order. Second, due to the fact that venue in FOIA cases is, by statute, established 'in the District of Columbia,' a significant proportion of FOIA cases arise in that District, which means that decisions of the District of Columbia with regard to FOIA are entitled to considerable deference." (*Marguerite Hiken v. Department of Defense*, Civil Action No. 06-02812 JW, U.S. District Court for the Northern District of California, May 24)