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Washington Focus: Rep. Jerrold Nadler (D-NY) has introduced the "State Secrets Protection Act" (H.R. 5956). The bill would require courts to consider the validity of the government's claim of the state secrets privilege in litigation. Courts would also be required to consider alternatives, such as introducing non-privileged substitutes for privileged evidence. In introducing the bill, Nadler indicated that his bill "recognizes that protecting sensitive information is an important responsibility for any administration and requires that courts protect legitimate state secrets while preventing the premature and sweeping dismissal of entire cases. The right to have one's day in court is fundamental to protecting basic civil liberties and it must not be sacrificed to overbroad claims of secrecy."

Privacy Interests in DeLay Investigation Outweigh Public Interest

After winning two cases in which the Justice Department refused to confirm or deny the existence of records pertaining to members of Congress, CREW has been roundly rebuffed in its attempts to get FBI records concerning its investigation of former House Majority Leader Tom DeLay related to allegations of corruption. In the first two cases, CREW was successful in convincing district court judges that the public interest in learning more about publicly acknowledged investigations of Rep. Don Young and Rep. Jerry Lewis required the agency to at least search, process, and make exemption claims on its responsive records. But this time, rather than defend a *Glomar* response, the FBI apparently decided to process CREW's request and ultimately informed CREW that it was withholding all the records under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records), as well as Exemption 2 (internal practices and procedures), Exemption 3 (other statutes), and other subparts of Exemption 7.

Judge Richard Leon first noted that the parties agreed that the records were compiled for law enforcement purposes and that

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that the broader privacy coverage of Exemption 7(C) was applicable. He then pointed out that "although Mr. DeLay's privacy interest is 'somewhat diminished' by virtue of his political stature, he did 'not surrender all rights to personal privacy when [he] accept[ed] a public appointment.'" CREW argued DeLay's privacy was further diminished by the fact that he and his attorney had publicly acknowledged that he was the subject of a DOJ investigation and that the agency had admitted that it had records that were created as part of its public corruption investigation. But Leon responded that merely acknowledging the existence of the investigation did not constitute a waiver of DeLay's privacy interests. He observed that "Mr. DeLay still maintains a substantial privacy interest in the substance of the investigation. . .Mr. DeLay's public statement relied on by plaintiff discloses only that an investigation was conducted by the DOJ and has since concluded without charges. Mr. DeLay never disclosed the nature of the investigation." Leon added that "the FBI's concession that it possesses responsive records does not waive Mr. DeLay's privacy interests. . .Mr. DeLay maintains a privacy interest in the content of those responsive records, not just in the disclosure of their existence."

After finding DeLay had a privacy interest in the records, Leon pointed out that CREW had the burden of showing the existence of a public interest in their disclosure. CREW argued disclosure would shed light on DOJ's performance of its statutory duties and that there was a substantial public interest in overseeing the agency's enforcement of ethics and anti-corruption law governing public officials. But, Leon, characterizing the majority of the records as FD-302s and FD-302 inserts containing factual or identifying information supplied largely by third parties, indicated that "while the Court acknowledges that there may be some public interest in the investigative materials and reports, which describe how evidence was obtained and are used to update other agencies on the investigation's progress, this minimal public interest does not outweigh the substantial privacy interests of Mr. DeLay and other third parties in the contents of the documents."

In a footnote, Leon discussed, and rejected, CREW's claim that the agency's grant of expedited processing lent support to its public interest argument. He noted that "plaintiff's argument, however, that DOJ admitted the presence of a public interest by granting expedited processing of plaintiff's request is misguided. Plaintiff sought expedited processing of plaintiff's request, which was granted. . .on grounds that the information sought pertained to a matter of 'widespread and exceptional media interest. . .in which there exist possible questions about the government's integrity which affect public confidence.' This standard for expedited processing is quite distinct from the Exemptions' public interest analysis." CREW also suggested its fee waiver request supported its public interest claim, but Leon pointed out that the agency had deferred a decision on the fee waiver request until it determined if any records would actually be disclosed.

Peculiarly, Leon then embraced Exemption 7(A) (interference with ongoing investigation or proceedings) as another reason to withhold the records entirely. Even though the DeLay investigation had been concluded without any charges, Leon relied on the FBI's claim that there was a "continuing large public corruption investigation" to conclude that "not only is the investigation still ongoing, but 'there are several outstanding convictions and sentencing proceedings. . .which have not yet been completed." He pointed out that disclosure could result in intimidation of potential witnesses, identify parties currently under investigation, and reveal the government's trial strategy.

He also agreed that some information was protected by Exemption 7(D (confidential sources). The agency argued that confidential sources needed protection because the information provided "by these individuals and organizations is singular in nature and if released, could reveal the informant's identity." Leon indicated that "considering these factors, the continuing nature of the investigation, the ongoing relationship between the FBI and the sources, and the potential 'chilling effect' of disclosure on current and future sources, I find that the information was furnished on a confidential basis and is, therefore, exempt from disclosure."

Leon found that other information was protected by Exemption 7(E) (investigative methods and techniques). He pointed out that "the FBI properly applied this exemption to protect law enforcement techniques and procedures used by FBI Special Agents during the investigation, which, if disclosed could cause circumvention of the FBI's ability to adequately enforce the law." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 11-592 (RJL), U.S. District Court for the District of Columbia, June 8)

Views from the States…

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

Arkansas

The supreme court has ruled that the Jacksonville Police Department improperly rejected Partne Daugherty's FOIA request based on its estimate of the time and expense it would take to provide her a copy of the patrol vehicle video for two officers during a three-week period. The police responded that the video would take about 90 hours to prepare and would cost $2,475.90 at the preparing officer's hourly rate of $27.51. The court started its inquiry by noting that "there is no allegation that Daugherty's request was not specific enough; rather, the Department refused to comply with the request on the basis that it deemed it too broad and too burdensome. Nothing in the FOIA allows a public agency to decline to reply to a request on this basis." The court added that "we disagree with the Department's assertion in its brief that it cannot be said that it denied Daugherty her rights under FOIA where its 'repeated efforts to provide Appellant with information *reasonably deemed relevant* in response to her requests.' There is simply no relevancy requirement in the FOIA." The court rejected the Department's claim that Daugherty's request fell within the provisions providing for greater fees for converting records to a particular electronic medium. Not only did the court find the Department routinely converted the videos to discs, but pointed out the section was applicable only when a requester asked for records that were not readily convertible. "Here, Daugherty did not request a summary, compilation, or tailored data not convertible; rather, she asked for copies of certain audio and video records. . . Thus, under this provision, where Daugherty simply requested a copy of the file, the Department could not charge fees that exceeded the cost of reproduction and certainly could not include the hourly rate of [the officer copying the tapes] in assessing costs to Daugherty." (*Partne A. Daugherty v. Jacksonville Police Department*, No. 11-344, Arkansas Supreme Court, June 14)\

Kentucky

The Attorney General has ruled that the Kenton County Public Schools improperly withheld some records pertaining to the bullying of a middle school student who committed suicide from his father. The Schools claimed a file kept by the school principal was the principal's personal file and was not subject to the Open Records Act. The AG disagreed, noting instead that "we reject the notion that a school official, responding in his official capacity to the death of a student enrolled in his school, under circumstances that may have been related to incidents in that school, generates 'personal' records relating to that student's death." The AG also rejected the Schools' argument that the Supreme Court's holding in *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002), in which the Court concluded that the Family Educational Rights and Privacy Act did not apply to students grading other students, applied to student-written letters to the dead student's family. The AG pointed out that "while the student letters at issue in this appeal may not have originated as education records subject to open records, FERPA, and record retention requirements, they

became 'education records,' subject to each of these laws, when they were 'turned over to the counselors at [the middle school] as part of the crisis response. Certainly, at this juncture, the letters were 'maintained by an educational agency or institution or by a person acting for such agency or institution. Inasmuch as the letters directly related to [the dead student], and were maintained by an educational institution or agency, [his father] was entitled to obtain copies of them. He was unable to do so because the letters were shredded." (Order 12-ORD-112, Office of the Attorney General, Commonwealth of Kentucky, June 15)

The Attorney General has ruled that the Transportation Cabinet did not fulfill its obligation to provide records to Robin Browning concerning road improvements when it told her she could find the records on its website. The AG noted that "inspection on a website 'is not [a method] that the Open Records Act specifically contemplates.' Therefore, a public agency that offers Internet inspection of records as the only option 'cannot be said to have discharged its statutory duty under the Act.' The Transportation Cabinet was obliged to provide Ms. Browning with an actual copy of the requested records." (Order 12-ORD-111, Office of the Attorney General, Commonwealth of Kentucky, June 15)

Ohio

The supreme court has ruled that the Family Educational Rights and Privacy Act provides the basis for withholding most of the remaining records pertaining to an investigation of members of the Ohio State football team that led to the firing of former head football coach Jim Tressel. ESPN requested the records, including emails Tressel sent to Ted Sarniak, a private individual who was a mentor to Ohio State player Terrelle Pryor during his high school and collegiate career. In a per curiam opinion, the court first noted that Ohio State had improperly rejected parts of ESPN's request because it was overbroad or pertained to an ongoing investigation, but went on to point out that, since ESPN had not requested any relief on the matter of how Ohio State maintained its records, the supreme court would go no further than to indicate that Ohio State had violated those procedural provisions. Turning to the substance of the records, the supreme court found that FERPA protected the records. The court explained that "Ohio State received approximately 23 percent of its total operating revenues—over $919 million—in 2010-2011 academic year from federal funds, and it is estimated that the university will receive the same amount of federal funds in the 2011-2012 academic year. Therefore, Ohio State, having agreed to the conditions and accepted the federal funds, was prohibited by FERPA from systematically releasing education records without parental consent." ESPN argued the records did not qualify as "student records" under FERPA because they were not related to the students' educational performance. The court disagreed, noting that "education records need only 'contain information directly related to a student' and be 'maintained by an educational agency or institution,' or a person acting for the institution. The records here—insofar as they contain information identifying student-athletes—are directly related to the students." However, the court indicated that some further records could be disclosed once student identifiers were redacted. The court observed that "with the personally identifiable information concerning the names of the student-athlete, parents, parents' addresses, and the other person involved redacted, FERPA would not protect the remainder of these records." (*State ex rel. ESPN, Inc. v. Ohio State University*, No. 2011-1177, Ohio Supreme Court, June 19)

Pennsylvania

A court of appeals has ruled that the Gaming Control Board violated the Right to Know Law when it failed to respond to James Schneller's request because it was sent to the agency's communications office and did not cite the Right to Know Law. After the Open Records Office upheld Schneller's complaint against the agency for failure to respond, the agency claimed the statute required that a request be sent to an agency's Open Records Officer and submitted on a request form made available by the agency. Since Schneller's request met neither criteria, the agency had not considered it a valid request. Rejecting the agency's

contention that Schneller's request was not properly addressed to the Open Records officer at the agency, Judge Mary Leavitt, writing for the majority, noted that "it is hard to believe that the legislature was concerned with the niceties of the written request salutation. This seems so in light of the legislature's flexible definition of 'written request' and the varied means of its authorized submission. The real purpose of 'addressed to the open-records officer' is to ensure that the requester does not shop around the agency for an employee sympathetic to his request. Only the open-records officer can handle the request." She added that "logically, therefore, the requirement that a written request be 'addressed' to the open-records officer does not mean that it contain a formal salutation: 'Dear Open-Records Officer.' Rather, it means simply that written requests must be 'directed' to the open-records officer, a word synonymous with 'addressed.' This is why the statute contains the provision that employees are 'directed' to forward requests to the open-records officer. If it were intended that all requests be formally addressed to the open-records officer, there would be no need to require that such requests be forwarded." Leavitt then explained that there was no requirement that requests cite the Right to Know Law. She pointed out that "the General Assembly intended that state and local agencies should presume that written requests for records are Right-to-Know requests." After finding the agency should have responded to Schneller's request, the court remanded the case back to the agency to make an initial determination as to whether or not the requested records were exempt. The dissent noted that the statute "says that the request must be 'addressed' to the open records officer. As to the next sentence, while it does say that employees must forward a written request to the open records officer, that sentence does not mean any request has to be forwarded, but only a request that is 'addressed' to the open records officer. To hold otherwise reads completely out of this provision the sentence that a written request 'must' be made to the open records officer. Taken together, these provisions mean that a request has to be 'addressed' to the open records officer; only requests 'addressed' to the open records officer are required to be forwarded; and time begins to run against the agency when the open records officer receives a properly addressed request. Because the request here was not addressed to the open records officer, for this reason alone, the Gaming Board was not required to respond to the request." (*Pennsylvania Gaming Control Board v. Office of Open Records*, No. 1134 C.D. 2009, Pennsylvania Commonwealth Court, June 11)

A court of appeals has ruled that the Governor's calendar notations may be protected by the deliberative process privilege and, as a result, the Office of Open Records erred when it rejected the privilege's application because it concluded as a matter of law that notations of appointments with nothing more did not qualify for the deliberative process privilege. The court noted that "the fact that information is contained in a calendar, instead of a memo, does not determine the character of the information or whether it is subject to an exception. As such, the fact that the information was placed in a calendar entry does not, as a matter of law, mean that it is impossible for it to be protected under an exception to the [Right to Know Law]." The court rejected requester Mark Scolforo's contention that the deliberative process privilege only covered records whose disclosure would reveal deliberations. Instead, the court indicated that "the combined use of the terms *reflects* and *deliberations* in [the exemption] supports the conclusion that [the exemption] codifies the deliberative process privilege and, therefore, demonstrates the General Assembly's intent to exempt the deliberative *process*." Because when the Office of Open Records considered Scolforo's appeal it decided the Governor's Office had not even established the threshold to qualify the calendars as privileged, the OOR had not considered the affidavit submitted by the Governor's Office. The court found this was error on the part of OOR and noted that "here, the content of the redactions is contested, and the agency is entitled to show why its asserted protection applies. In deciding whether this redacted information qualifies for protection under an exception, the OOR should have determined the content of the redactions: the OOR could not make an informed decision here without any knowledge regarding the content of the Affidavit." The court went on to find that the OOR was required to conduct an *in camera* review under the circumstances, pointing out that "in assessing whether [the exemption] applies to the subject matter of the internal meetings listed on the Calendars, the OOR should ascertain, when conducting the *in camera* review, whether disclosure of the

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subject matter of the internal meetings would expose to public view the deliberative process of the Governor's Office." Several judges dissented, pointing out that the agency's affidavits did not adequately explain why the meeting information was deliberative. The dissent also noted that an *in camera* review was pointless without more guidance from the court. (*Office of the Governor v. Mark Scolforo*, No. 739 C.D. 2011, Pennsylvania Commonwealth Court, June 7)

Virginia

The supreme court has upheld the ruling of a trial court finding that Jill DeMello Hill failed to show that the Fairfax County School Board held an improper email meeting to discuss the closing of Clifton Elementary School. When the school board voted to close the elementary school, Hill filed suit, alleging that a flurry of emails exchanged between several board members prior to the meeting constituted an improperly closed meeting. However, the trial court found that the exchange of emails did not involve sufficient simultaneity and did not result in a group consensus or discussion of business between a quorum of members. Hill argued that the trial court 'was plainly wrong in finding that the e-mails did not constitute an assemblage of at least three members of the Board." The trial court found that "the Board [member]'s e-mails that involved some sort of back-and-forth exchange were between only two members at a time, rather than the three required," and that "e-mails sent to more than two Board members" whether directly, by carbon copy, or by forwarding, "conveyed information unilaterally, in the manner of an office memorandum." The supreme court noted that its task was to determine whether the trial court's findings of fact were plainly wrong. The court concluded that the trial court's findings "are a reasonable interpretation of the evidence regarding how the e-mails were used. The [trial] court's findings establish that the feature of simultaneity inherent in the term assemblage is not established in this case. Accordingly, we cannot say that the court's judgment that there was no violation was plainly wrong or without support in the evidence." Hill also argued the trial court erred in finding that she did not substantially prevail even though the trial court had ordered the school board to disclose some other records. The supreme court pointed out that the phrase "merits of the case" in the attorney's fees provision "plainly refers to the object of the action in which a claim that the FOIA has been violated is made, and that the party has prevailed in proving that there was some violation of the FOIA by the public body." The supreme court observed that "the [trial] court correctly noted that the object of Hill's mandamus petition was not to obtain the small number of documents that the court found should have been disclosed. Nor was it to establish that the Board had failed to supply these documents in a timely and efficient manner. Rather, the principal purpose of Hill's petition was to overturn the result of the Board's decision to close Clifton Elementary. As she did not prevail on that issue, we hold that the [trial] court did not err in denying her request for attorneys' fees and costs." (*Jill DeMello Hill v. Fairfax County School Board*, No. 111805, Virginia Supreme Court, June 7)

The Federal Courts…

A federal magistrate judge in New York has ruled that the public interest in knowing why NIH waived provisions of the Ethics in Government Act outweighs the individual advisory committee members' privacy interest. Under the Ethics in Government Act, members of advisory committees are required to submit a Form 450, which lists all information about financial, business, and personal interests that could pose a potential conflict of interest. Such lists are known as "recusal lists" and are provided to the members of an advisory committee so they are aware of members' potential conflicts of interest and can avoid such conflicts. Charles Seife requested the recusal lists and waiver determinations, which allow NIH to make an exception to the conflict of interest rules when the need for an individual's potential service outweighs the potential conflict of interest. NIH redacted names of entities with which each member had a financial interest, the nature of each

interest, and labels indicating whether the interest belonged to a spouse or dependent child. While NIH justified the redactions of the recusal lists under **Exemption 3 (other statutes)**, it relied on **Exemption 6 (invasion of privacy)** for the redactions to the waiver determinations. Magistrate Judge Gabriel Gorenstein turned first to the recusal lists. He pointed out that the Ethics in Government Act prohibited disclosure of information from the Form 450s. Seife argued that prohibition only restricted disclosure of Form 450s themselves. But Gorenstein disagreed, noting that "the withheld material is unquestionably information that the individual was 'required' to provide when he or she completed the Form 450 inasmuch as the information was transferred by the agency, without involvement by the employee, when the recusal list was generated. Thus the withheld material comes within the bar to disclosure contained in [the Ethics in Government Act]. The mere fact that NIH transfers this information from the Form 450 to another form—a recusal list—should not dissolve the confidentiality protection enshrined in the statute." He then found that the label indicating whether an interest belonged to a spouse or dependent child was also protected by the Ethics Act even when it appeared in the waiver determination. He pointed out that "these letter indicators were transferred to the waiver determination forms. Thus, the waiver determinations contained information that was 'more extensive' than what the [advisory committee members] were required to include on the Form 450. While the Court finds the statutory language to be rather opaque, both the Government and Seife agree that the statute should be read as permitting an agency to withhold under FOIA Exemption 3 any information that is not required to be disclosed on the Form 450." Because the waiver determinations were not covered by the prohibition in the Ethics Act, the agency relied on Exemption 6. Gorenstein first concluded that there was a privacy interest in the waiver determinations. As to the public interest, he noted that "the particular information withheld here—the [advisory committee members'] financial information—sheds light on an important issue: namely, the neutrality of the participants and the integrity of the advisory committee review process." Balancing the two interests, Gorenstein concluded that "the [advisory committee members'] interests in keeping their personal financial information private, while significant, are outweighed by the public's interest in detecting undue influence on the functioning of government. The information Seife requests serves the core purpose of FOIA. It sheds light on the nature of external influences on certain NIH employees, and it is necessary for the public to independently evaluate the propriety of both the grants of waivers and of the work conducted by the NIH committees." (*Charles Seife v. National Institutes of Health*, Civil Action No. 11-6646 (GWG), U.S. District Court for the Southern District of New York, June 12)

Judge Beryl Howell has ruled that the Justice Department's Office of Legal Counsel's classified affidavit, which Howell viewed *in camera*, provided ample support for its claim that records pertaining to Sharif Mobley's incarceration in Yemen were protected by **Exemption 1 (national security)**. Although Mobley was a U.S. citizen, he was currently being held in Yemen for allegedly killing a prison guard. He requested records from OLC pertaining to the reasons for which he was being held in Yemen. The agency eventually located 13 documents, but withheld all of them under Exemption 1. The agency explained to Howell that since the information in the records was classified by the originating agencies, it had been derivatively classified when it was received by OLC. The agency pointed out that due to the "highly sensitive nature of the responsive records. . .it is not possible to demonstrate to the Court in a public setting that the requested records are currently and properly classified" because "the very association of the identities of the original classifying authorities with this matter is itself a classified fact." Noting that courts were required to provide deference to agencies' national security claims and that the agency's claims "need only be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context," Howell pointed out that "these submissions were sufficiently thorough and detailed to allow for appropriate judicial review of the agency's decision." She found that "the defendant has amply sustained its burden of showing that the documents at issue were properly withheld from disclosure under FOIA exemption 1." Mobley argued that the public affidavits provided so little information that he had no opportunity to challenge

the agency's reasons for withholding the records. But Howell observed that "where, as here, the defendant's justifications for withholding records are submitted on an *ex parte*, *in camera* basis, the plaintiff is indisputably in a difficult position to contest the defendant's motion for summary judgment. The Court is also at a disadvantage since it does not have 'benefit of criticism and illumination by a party with the actual interest in forcing disclosure.' The Court must therefore scrutinize carefully the government's justifications for the withholdings, which it has done in this case." She concluded that "based upon this review, the Court agrees with the defendant that even the 'banal information' regarding the documents that the plaintiff seeks in this case is properly classified." (*Sharif Mobley v. Department of Justice*, Civil Action No. 11-1436 (BAH), U.S. District Court for the District of Columbia, June 8)

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