Volume 38, Number 2
January 18, 2012

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: ASAP has announced its National Training Conference at the Hilton New Orleans Riverside Hotel, Mar. 21-23. The three-day session includes basic and advanced training on a variety of FOIA and privacy issues, including on Mar. 22 agency-specific training for Defense Department, NASA, and Interior Department staffers. For registrants staying at the Hilton, the cost of the three days is $810 for members, $875 for non-members. For registrants staying somewhere besides the Hilton, the cost is $910 for members and $975 for non-members. Cost of a room at the Hilton is $135 a day and should be reserved directly through the Hilton at (504)-561-0500. For more information, including registration forms, visit the ASAP website at: www.accesspro.org.

Court Finds Public Interest in DOJ Investigation of Congressman

Judge Gladys Kessler has ruled that the Justice Department improperly refused to either confirm or deny the existence of records on an investigation of Rep. Don Young (R-AK), even though the investigation of Young, for appearances of corruption in sponsoring a $10 million earmark for and expansion of I-75 in Florida that would have connected the freeway with Coconut Road, was publicly known and was authorized by a specific statute. Nevertheless, when CREW requested any information not protected by grand jury secrecy, the agency refused to search for records, claiming they would be categorically exempt under Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records).

The charges stemmed from a trip Young made as Chair of the House Transportation Committee to Florida to discuss the $10 million proposed project. While Young was in Florida, a local real estate developer, who owned 4,000 acres along the Coconut Road, organized a fund raiser in Young's honor. When the expansion was approved by the House and the Senate, the original language pertaining to the project was deleted and the phrase "Coconut Rd. interchanges I-75/Lee County" was inserted. The bill was then signed into law by President George W. Bush.

ACCESS REPORTS

In response to the controversy, Congress directed DOJ in 2008 to conduct an investigation into the earmark allegations. When the investigation provision was discussed in the House, Young gave a detailed explanation of his actions. The investigation provision was then enacted as section 502 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act. On August 4, 2010, Young's office issued a press release indicating that DOJ's Public Integrity Section had concluded its investigation and declined to prosecute Young.

Kessler first explained that normally anything that would associate a third party with a criminal investigation would implicate that individual's privacy rights. She added that "this may be especially true for politicians who rely on the electorate to return them to public office. For this reason, it cannot be said that Rep. Young does not have even a *de minimis* or 'cognizable' privacy interest under FOIA." Having said that, however, she noted that "those very important general principles of privacy have far less force in this case because the information—namely, the fact that DoJ conducted an investigation of activities involving Rep. Young—is already a matter of public record. Rep. Young has himself confirmed in a press release issued by his Congressional office that there was an investigation into his activities, and has recognized that he has 'been the subject of much innuendo concerning [his] intent and motivation of this project [referring to the Coconut Road Earmark].'" One can have no privacy interest in information that is already in the public domain, especially when the person asserting his privacy is himself responsible for placing that information into the public domain." But, assessing Young's privacy interest, Kessler observed that "given the rather narrow meaning of 'substantial cognizable interest' in this Circuit, and given the fact that Rep. Young has more than a merely *de minimis* interest in his privacy, the Court concludes that he does have a substantial—although much diminished—privacy interest in withholding the documents Plaintiff seeks."

Kessler then turned to the public interest in disclosure. She indicated that "it is difficult to understand how there could not be a substantial public interest in disclosure of documents regarding the manner in which DoJ handled high profile allegations of public corruption about an elected official. Clearly, the American public has a right to know about the manner in which its representatives are conducting themselves and whether the government agency responsible for investigating, and, if warranted, prosecuting those representatives for alleged illegal conduct is doing its job." She noted that "in particular, in these days of political turmoil, constant accusations and name calling, and concern about our economic and social future, there is, if anything, a heightened public interest in learning what the Government is 'up to.' . . .In this case, disclosure of information concerning DoJ's investigation of Rep. Young would unquestionably 'shed light on the agency's performance of its statutory duties.'" She added that "in addition to the widespread public interest in this country at this time in holding its Government accountable, we have the added, and decidedly uncommon fact in this case, that Congress passed a specific piece of legislation to conduct an investigation of all 'allegations of impropriety regarding [the Coconut Road project] to ascertain if a violation of Federal criminal law has occurred.'"

Kessler explained that Young's central position as Chair of the Transportation Committee was further evidence of the importance of public oversight. She observed that "given the fact that Rep. Young was at that time Chair of the House of Representatives Transportation Committee, and given the detailed remarks he made on the floor of the House of Representatives about this matter, there is a substantial public interest in examining the adequacy of DoJ's enforcement of other types of law governing the activities of federal officials in addition to the explicit direction given by Congress to DoJ to investigate the Coconut Road matter."

The agency argued that the only relevant public interest was the conduct of the agency and that CREW had not alleged any wrongdoing on the part of Justice. Saying that "it is not correct that Plaintiff must provide compelling evidence of any such conduct on the part of DoJ," Kessler noted that "it is only when a requester is making such allegations of illegal or otherwise improper conduct that 'compelling' evidence must be offered demonstrating such behavior." She cited the D.C. Circuit's holding in *ACLU v. Dept of Justice*, 655 F.3d 1

(D.C. Cir. 2011) for distinguishing "situations in which that requirement is applicable from the situation presented in this case where a FOIA requester is 'not (or at least not only) seeking to show that the government's. . .policy is legally improper. . .' The Court ruled that evidence of such misconduct is not required in that instance. "'[M]atters of substantive law enforcement policy. . .are properly the subject of public concern," whether or not the policy in question is lawful.'" And in *Multi Ag Media v. Dept of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), the court indicated that "the relevant public interest under FOIA is 'the extent to which disclosure [of the requested files] would serve the "core purpose of the FOIA" which is "contribut[ing] significantly to public understanding of the operations and activities of the government.'" Thus, it is clear that there is no requirement that a FOIA requester must always allege that the Government is acting illegally in order to establish the existence of a substantial public interest."

Finally, Kessler rejected the agency's argument that if the law were as CREW claimed then requesters would be able to get records about decisions to prosecute or not to prosecute. Kessler pointed out that "this is known as the time-worn 'opening of the flood gates' argument. As is usually the case with such arguments, it vastly overstates the perceived danger and ignores the fact that once a *Vaughn* Index is filed, the Court will make a specific individualized decision for each document as to whether it should be redacted or totally withheld pursuant to Exemption 6 and Exemption 7(C)." Kessler concluded by emphasizing that "the public needs to know how DoJ carried out its statutory duties to investigate allegations of bribery and corruption of members of Congress. That is the purpose of FOIA." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, Civil Action No. 11-754 (GK), U.S. District Court for the District of Columbia, Jan. 10)

Views from the States…

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

Connecticut

A trial court has ruled that the FOI Commission properly concluded that the evidentiary portions of teacher arbitration hearings must be open to the public. The Department of Education argued that the arbitration panels were made up of private contractors and were outside the FOIC's jurisdiction. But the court pointed out that "the reason that the department was to supervise the arbitration panel was the legislature's intent that the state, not private arbitrators alone, have involvement in the negotiation process. This was a 'delegation of authority' concern for the legislature, resolved by its placing the panel within the department." The court also noted that the FOIC had not found that the panel members were independent contractors. Instead, "the FOIC found that the arbitrator was an independent agent who entered into a contract with the office of labor relations and the union." The department also argued that the supreme court, in *Glastonbury Education Association v. FOI Commission*, had ruled that the last best offers in arbitration hearings qualified under the "strategy or negotiations" exemption, thus making the entire process exempt. However, the trial court explained that the *Glastonbury* decision left open the question of disclosure of more narrowly defined records. In the case, "the FOIC has now issued the more limited order envisioned by the majority in *Glastonbury*. This court concludes that the statutory construction of the FOIC finding that the evidentiary portion of the arbitration hearing was a public meeting was correct." (*Connecticut Department of Education v. Freedom of Information Commission*, No. CV 11 6009562S, Connecticut Superior Court, Judicial District of New Britain, Dec. 29, 2011)

ACCESS REPORTS

Pennsylvania

A court of appeals has ruled that the personal security prong of the exemption for information that might cause physical harm to an individual encompasses birth dates of state employees. As a result, the court upheld the decision of the Governor's Office of Administration to redact that information when it disclosed database information about state employees. The Office of Open Records had ruled in favor of requester Dylan Purcell after finding that the legislature had rejected attempts to include birth dates as information that could be protected. The GOA argued that the supreme court had found a constitutional right of privacy in interpreting the previous version of the Right to Know Law which encompassed birth dates. However, the court rejected that claim, noting that "we hold that there is no privacy exception embedded in the current RTKL applying to all birth dates; consequently, no balancing of interests in contemplated by the current RTKL." But the court rejected Purcell's claim that the personal security exception required a showing of likely physical harm to apply. The court indicated that "we agree with GOA that the plain language of the personal security exception protects two concepts: risk of physical harm and personal security." The court added that "Requester's approach essentially ignores the phrase 'personal security.' We do not have the luxury of pretending statutory language means nothing; rather, we strive to give effect to all the words of a statute." The court concluded that "regardless of a general right to privacy, the clear language of the personal security exception protects information, including birth dates, to the extent that release 'would be reasonably likely to result in a substantial and demonstrable risk. . .to the personal security of an individual. Here, . . .GOA proved that the personal security exception applies and protects the month and date of birth from disclosure." (*Governor's Office of Administration v. Dylan Purcell*, No. 2452 C.D. 2010, Pennsylvania Commonwealth Court, Dec. 29, 2011)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that the Executive Office for U.S. Attorneys was not obligated to ask the FBI for information about an FBI file number in order to locate the criminal file to which the case number referred. Julian White requested court filings from a federal criminal case referenced to an FBI file number, prosecuted by an identified Assistant U.S. Attorney in the Eastern District of New York that led to White's conviction for interstate transportation of stolen vehicles. After searching records from the Eastern District of New York in its LIONS database, EOUSA told White it found no responsive records. Kollar-Kotelly explained that the agency, "believing the 'defendant' in the case referenced in Plaintiff's request to be Mr. White, searched for Mr. White's name in the LIONS database. Plaintiff did not identify who the 'defendant' might be. The only names provided in the request were Mr. White's and the prosecutor's. [The agency] also performed a search using the FBI file number provided by Plaintiff's request. This search likewise failed to return any responsive records." White attacked the **adequacy of the search** conducted by EOUSA. But Kollar-Kotelly noted that "the 'Case Search' inquiry in LIONS allows users to search by agency file numbers, including FBI file numbers. If the FBI was the investigating agency, the FBI file number should be in the database, and thus any case relating to a particular FBI file number should be retrieved by a search for the FBI file number. In relevant part, [the agency's] declaration indicates [it] searched for the FBI file number as provided in the FOIA request, but the search returned no responsive records." Kollar-Kotelly pointed out that "Plaintiff fails to explain what additional information could be provided, or why it would be relevant to determining the adequacy of Defendant's search. . .Although the affidavit could in theory be more detailed, that fact alone does not warrant denying summary judgment in favor of Defendant. Having failed to provide any evidence to overcome the presumption of good faith afforded to Defendant's affidavit, Plaintiff's challenge to [the agency's declaration] fails." White argued EOUSA was obligated to contact the FBI to get

more information about its file number. He claimed that *Natural Resources Defense Council v. Dept of Defense*, 388 F. Supp. 2d 1086 (C.D. Cal. 2005), supported his case. But Kollar-Kotelly found that the *Natural Resources* decision, requiring Defense to either refer the request to the Air Force, which was the lead agency on the subject matter of the request, or to tell NRDC to request the records from the Air Force because it was relevant information the agency knew but the requester did not, was inapplicable here. She noted that "by contrast here, the UASO did not have any information unknown to Plaintiff that would have re-directed Plaintiff's search to the proper agency. Rather both the Plaintiff and the agency lacked additional information other than the FBI file number, the name of the requestor and the prosecutor, and Plaintiff seeks to place the burden of investigation on the agency. *Natural Resources* provides no support for the notion that the responding agency is required to request additional information from another agency in order to process a FOIA request that was directed towards the proper agency." As to whether or not responsive records existed, Kollar-Kotelly indicated that "even where it 'strains credulity' to think that the requested documents do not exist, that alone is not a sufficient basis to 'undermine the determination that the agency conducted an adequate search for the requested records. Given the adequacy of the search. . . Plaintiff's speculation that responsive records must exist does not amount to 'countervailing evidence' sufficient to raise a 'substantial doubt' as to the adequacy of the USAO's search." (*Julian C. White v. United States Department of Justice*, Civil Action No. 11-279 (CKK), U.S. District Court for the District of Columbia, Jan. 5)

A federal court in New York has largely ruled in favor of Customs and Border Protection on a variety of documents pertaining to the agency's use of trains in New York State to locate illegal immigrants. The agency had withheld identifying information from emails under **Exemption 6 (invasion of privacy)**, a memo under **Exemption 5 (privileges)**, and portions of other documents under **Exemption 7(E) (investigatory methods and techniques)**. Families for Freedom argued that minutes of meetings between CBP and Amtrak officials did not relate to law enforcement techniques. But Judge Shira Scheindlin noted that "the Amtrak meeting notes were created for that purpose—they constitute the memorialization of a meeting in which Border Patrol officials met with Amtrak in order to discuss how their law enforcement activities impacted the company's transit operations and how they might adjust those activities." While Scheindlin found that mundane mentions of agency employees names were not protected by **Exemption 6**, identifying information in other records compiling arrest statistics were protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Families for Freedom argued that a legal memo had not been prepared in anticipation of litigation. But Scheindlin pointed out that "given Border Patrol's extensive program of transportation checks and arrests, its anticipation of litigation was reasonable. The memorandum is classic attorney-client communication and may well be protected attorney work-product. It is exempt from disclosure." (*Families for Freedom v. United States Customs and Border Protection*, Civil Action No. 10-2705 (SAS), U.S. District Court for the Southern District of New York, Dec. 27, 2011)

In a related decision, a federal court in New York has ruled that Families for Freedom is entitled to **discovery** in its FOIA suit against Customs and Border Protection for records pertaining to the agency's search for illegal immigrants on buses in New York State. Judge Shira Scheindlin acknowledged that discovery was normally frowned upon in FOIA cases and indicated that she had previously given the agency a presumption of good faith in its searches. But noting that "the Court's patience has worn out," she explained that "because the agency *has not* satisfied its burden, a showing of bad faith is not necessary [in order to be granted discovery]. [The agency] now acknowledges that its previous searches were insufficient—for example, they did not perform a proper search of [the Border Patrol Chief of Staff's] email archives—and that its earlier declarations misrepresented the scope of those searches. In [a prior ruling], I found that the declarations were sufficient because I accorded them the presumption of good faith that is appropriate in such

ACCESS REPORTS

contexts. But the accuracy of those declarations has been undercut by evidence in the record, including the agency's latest declaration." Further, she noted: "there is tangible evidence in the record that establishes that the agency has not performed an adequate search. Plaintiffs' second FOIA request was made on April 2, 2010. That was nearly twenty-one months ago. The agency has not completed what it considers to be an adequate search. The agency's untimely response is inexcusable as a matter of law." (*Families for Freedom v. United States Customs and Border Protection*, Civil Action No. 10-2705 (SAS), U.S. District Court for the Southern District of New York, Dec. 27, 2011)

A federal court in Oregon has ruled that the Natural Resources Conservation Service failed to show that timber was a crop covered by the **Exemption 3** provision in § 1619 of the Food, Conservation, and Energy Act of 2008, which allows the Agriculture Department to withhold geospatial data provided by an agricultural producer. The court started its analysis by noting that to qualify for the exemption, the court needed to determine "whether the forest land owners in this case are 'agricultural producers' [which] depends on whether wood or timber is a crop." Because "crop" was not defined in the statute, the court looked to its ordinary meaning. The court observed that "'crop' ordinarily means 'the top, head, or highest part [originally] of an herb, flower, or tree.' Given that the definition of 'crop' includes only the top or highest part of a tree, as opposed to the entire tree, I find that the land owners are not agricultural producers. The first element may still be met if the forest land owners are 'owners of agricultural land.' "'Agricultural' means the 'harvesting of crops'. . .Because I have found that the ordinary definition of 'crop' does not include wood or timber, the forest owners are not agricultural producers." The court also found that timber did not qualify as an agricultural commodity. The Audubon Society of Portland argued that the statute distinguished between "farmers" and "forest owners," while the agency brought in contextual references from other statutes to show that timber could be considered an agricultural commodity. But the court noted that "because the FCEA makes a distinction between 'agriculture' and terms related to forests, I find that wood, timber, and forest products are not agricultural commodities under the FCEA." Although the court agreed that the redacted information was geospatial data, because the timber owners did not qualify as agricultural producers the exemption did not apply. (*Audubon Society of Portland v. United States Natural Resources Conservation Service*, Civil Action No. 03:10-CV-1205-HZ, U.S. District Court for the District of Oregon, Jan. 11)

Judge Emmet Sullivan has ruled the Justice Department properly withheld complete chapters of the FBI's Domestic Investigations and Operations Guide from Muslim Advocates. Muslim Advocates had previously argued that the agency waived its ability to withhold the guide after it shared some of its contents with outside advocacy groups. Sullivan had rejected Muslim Advocates' waiver claim, but had found the agency had so far failed to show why entire chapters of the guide were redacted and ordered the agency to conduct a **segregability** analysis. The agency provided a further affidavit to Sullivan and after reviewing it he agreed the agency had properly withheld the entire chapter. He pointed out that "having carefully reviewed defendant's *ex parte* declaration, the Court finds that the government has now satisfied its burden of establishing its right to withhold the information contained in Chapter 16 of the [Guide]. The declaration describes in detail each redacted section of Chapter 16 and the justifications for withholding that information, and it demonstrates that the information withheld logically falls within **Exemption 7(E) (investigatory methods and techniques)**." He added that "the Court concludes that it is both plausible and logical that the disclosure of detailed information regarding the FBI's procedures for investigation of and undisclosed participation in target organizations could risk circumvention of the law and impede the FBI's ability to carry out its mission. Moreover, the Court finds no evidence in the record that contradicts the government's justifications for withholding the redacted information or demonstrates bad faith." (*Muslim Advocates v. United States Department of Justice*, Civil Action No. 09-1754 (EGS), U.S. District Court for the District of Columbia, Jan. 11)

The D.C. Circuit has ruled that the appearance on the Internet of a video made by the DEA showing DEA Agent Lee Paige accidentally shooting himself in the thigh during a presentation at a community center in Orlando did not violate the **Privacy Act** because at the time it was disclosed it was not in a system of records retrievable by the agent's identifier. A parent taped the presentation with a mini-DV with Paige's knowledge and provided the tape to DEA agents investigating the incident. A DEA agent from the Orlando District Office copied the Mini-DV onto a VHS tape. The VHS tape was sent to the DEA Office of Inspections (IN) by the Orlando District Office. The Orlando District Office also made several more copies of the Mini-DV, copying to CDs a 4:09 video showing only the shooting incident. After Paige's accidental discharge was reported in the press, copies of the 4:09 video began appearing on the Internet and on the DEA's internal email system. The DEA Office of Professional Review conducted an investigation of the disclosure but was unable to determine who released it. Paige then filed suit under the Privacy Act and the Federal Tort Claims Act. The district court ruled against Paige on both counts, specifically finding the 4:09 video was not in a system of records retrievable by Paige's name at the time of its release. The D.C. Circuit agreed, pointing out that "the Mini-DV was not a covered record at the time the 4:09 video was copies from it because the information on the Mini-DV was not retrievable by Paige's name or other personal identifier, to wit: it was neither labeled nor filed by Paige's name or other personal identifier, and Paige has offered no evidence that information on the Mini-DV 'was actually *retrieved* by [a] personal identifier' while in the possession [of the Orlando District Office]." Paige argued that an IN file was automatically triggered by the shooting incident. However, the D.C. Circuit noted that its decision in *Henke v. Dept of Commerce* "makes clear that 'retrieval *capability* is not sufficient to create a system of records.' Here, no system of records existed from which information was in fact retrieved by Paige's name or other personal identifier until the IN program analyst opened the IN file at IN headquarters [later on in the investigation]. By then, however, the 4:09 video had already been copied from the Mini-DV. And disclosure of the 4:09 video was not prohibited under the Privacy Act simply because the Mini-DV *subsequently* became a 'record which is contained in a system of records.' Furthermore, there is no evidence that a copy of the 4:09 video was made from the Mini-DV *after* the latter was placed in the IN file." Nevertheless, the court issued a warning about the privacy implications of electronic records. The court noted that "the widespread circulation of the accidental discharge video demonstrates the need for every federal agency to safeguard video records with extreme diligence in this internet age of iPhones and YouTube with their instantaneous and universal reach. The DEA's treatment of the video-recording—particularly the creation of so many different versions and copies—undoubtedly increased the likelihood of disclosure and, although not an abuse of a system of records, is far from a model of agency treatment of private data." (*Lee Paige v. Drug Enforcement Administration*, No. 11-5023, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 17)

Recently Published

The fifth edition of "Litigation Under the Federal Open Government Laws, 2010," published by EPIC through a partnership with Access Reports and the James Madison Project, is now available. The book, edited by Harry Hammitt, Ginger McCall, Marc Rotenberg, John Verdi and Mark Zaid is a comprehensive discussion of the FOIA and includes chapters on the Privacy Act, Sunshine Act, and Federal Advisory Committee Act as well. With a foreword by Sen. Patrick Leahy, the 2010 edition includes the Obama and Holder FOIA memoranda, the Open Government Directive, and the new Executive Order on Classification. Cost of the book is $75; postage is $7 within the U.S. The book can be purchased from Access Reports.

ACCESS REPORTS

Price Increase

Access Reports increased its subscription price for the first time in ten years starting January 1, 2012. A year's subscription to the newsletter is now $400 and a year's subscription to Access Reports Full Service (newsletter plus loose-leaf Reference File) is $600.