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Washington Focus: Several recent initiatives have been announced designed to increase and enhance the availability of government records online. Aside from FOIAOnline, the new collaborative project involving the EPA, Commerce, and the National Archives, NARA recently launched an online portal for its declassification activities, including documents released by the Interagency Security Classification Appeals Panel (ISCAP), which decides mandatory declassification review decisions appealed to it through the executive order on classification. Describing the availability of ISCAP records, OMB Watch noted that "the website contains documents that have been declassified and released, as well as a brief description of the released documents, the documents' date, and affiliated agency, along with an identification number." OMB Watch recommended that "an important next step would be to publish decisions on the ISCAP site and FOIAOnline.:" OMB Watch added that "publishing FOIA and ISCAP decisions would help future requesters understand how agencies decide certain types of requests, which could help in preparing their own requests and appeals." EFF also announced its Transparency Project, which allows users to search through hundreds of thousands of pages of government records disclosed to EFF through FOIA.

Court Grants Fees in Suit Leading to Postponement of Execution

A federal court in California has awarded the ACLU of Northern California $178,000 in attorney's fees for its FOIA litigation against the DEA for records relating to state efforts to import, transfer, or purchase drugs commonly used in lethal injections. As a result of the litigation, at least one scheduled execution was temporarily halted when the DEA discovered Arizona had imported sodium thiopental in violation of the Controlled Substances Act.

Sodium Thiopental is used by 30 states as part of their lethal injection protocol. In May 2010 thiopental was no longer available domestically and states began to look for foreign sources for the drug, which prompted the ACLU of Northern California and the San Francisco *Bay Guardian* to

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request records concerning such attempts to import thiopental. While the agency granted the request, it produced no documents because of its backlog. However, when the plaintiffs learned that two states had set execution dates in May and June 2011, they filed suit to force the agency to disclose the documents before the executions occurred. The DEA produced some documents in May 2011, but not any Form 236 import declarations. The court denied the plaintiffs' motion for a preliminary injunction on May 23, 2011 and the agency released four Form 236s the same day. The next day, the U.S. Attorney's Office notified the Arizona Attorney General that Arizona's supply of thiopental was imported in violation of the Controlled Substances Act and the Arizona Supreme Court stayed the execution. The parties stipulated a dismissal of the FOIA suit in April 2012 but were unable to reach an agreement on attorney's fees.

The plaintiffs argued they had substantially prevailed because their litigation caused the agency to disclose the records when it did. In response, the agency contended the litigation was not necessary and "the timing of production was the result of unavoidable delay due to their backlog of FOIA requests." But Judge Richard Seeborg pointed out that "while the DEA may have eventually produced the documents requested by plaintiff under FOIA, the immediacy of the scheduled executions made the timing of production critical. Plaintiffs filed their request for expedited production on January 4, 2011. On March 9, 2011, plaintiffs were told they would be 'notified of [the DEA's] initial determination by correspondence at a later date.' This letter gave no guidance as to the progress of the production request, or when plaintiffs might expect to receive an answer. Plaintiffs heard nothing further from the DEA before filing suit in this Court on April 22, 2011."

The agency argued that it started searching for records on February 8, 2011 before the complaint was filed. Seeborg noted that "defendant apparently failed, however, to notify plaintiffs that it had begun such a search. Plaintiffs were thus justified in believing that the filing of this lawsuit was necessary in light of the impending dates of execution." He added that "furthermore, the filing of this matter prompted a supplemental search for records to take place, resulting in the discovery of documents held in the DEA Administrator's office, additional field division offices, and the unearthing of additional documents in offices already searched. Absent is any indication that this supplemental search would have taken place without the filing of plaintiffs' action in federal court. Indeed, this Court found that the DEA's initial search for records was inadequate, and ordered defendant to expand its search to meet the 'reasonableness' standard. Thus, plaintiffs' suit was at least a catalyst, if not the primary cause, for the disclosure of important public records."

The DEA claimed the plaintiffs' preliminary injunction motion was unnecessary because the agency had already agreed to submit documents and had expended significant effort in complying with the request before suit was filed. But Seeborg indicated that "defendant fails to recognize that the fees inquiry looks at whether the 'filing of the action' was reasonably necessary to the production of documents, not whether each individual litigation step taken was efficacious. . .[T]he filing of this matter in federal court was the spur that incentivized defendant's thorough scouring of its records."

The agency contended litigation could not be the catalyst when the agency was acting with due diligence in dealing with its backlog. But Seeborg pointed out that "defendant has provided insufficient evidence to support its claim of due diligence. Despite granting plaintiffs' request for expedited processing, defendant did not provide plaintiff with any meaningful updates on its intended production until after plaintiffs filed suit." He noted that "it was not until after suit was filed that defendant began to search its field divisions and send consultation requests to other agencies. These requests specifically referred to the pending preliminary injunction in requesting prompt responses. The intention to respond to a FOIA request after months of silence cannot evidence due diligence."

Having found the plaintiffs were eligible for a fee award, Seeborg proceeded to find that they were entitled to one as well. He noted that "the documents produced reveal that several states procured foreign

drugs in violation of federal drug laws for the purpose of executing prisoners, and that the DEA had ignored these violations. This revelation resulted in widespread media attention regarding the use of potentially illegal drugs for prisoner executions. . .Ultimately, the media's attention led the DEA to step in with information leading to the postponement of the scheduled Arizona execution. Thus, plaintiffs' actions not only widely informed the public, but resulted in the agency reacting to, and complying with, its disclosure obligations." He also found that the ACLU and the *Bay Guardian* did not have any personal or commercial interest in the records. Although Seeborg acknowledged that the agency's position was not unreasonable, he observed that "this factor is insufficient to outweigh the [other] factors that point in favor of plaintiffs."

The agency argued that plaintiffs could not be compensated for review time. But Seeborg noted that "it is illogical to suggest that a lawyer's time spent reviewing documents cannot be compensated. Without review of the documents produced, plaintiffs would have been unable to ascertain whether defendant had complied fully with its FOIA request and thus unable to determine what issues needed to be litigated. No reasonable client would refuse to compensate a lawyer for this work." (*American Civil Liberties Union of Northern California v. Drug Enforcement Administration*, Civil Action No. 11-01997 RS, U.S. District Court for the Northern District of California, San Francisco Division, Nov. 8)

Views from the States…

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

Delaware

The trial court has affirmed the Attorney General's ruling that an amendment to the Freedom of Information Act expanded the definition of public body to include local sewer and water authorities. After rejecting a request from Georgette Williams, a member of the town council, the Camden-Wyoming Sewer and Water Authority argued that it was not a public body under the access statute. The court disagreed, noting that "the enabling statute explicitly declares that authorities created under the act are 'public bodies.' The Amendment in question was directed to ensuring that such water and sewer authorities would not be able to rely on what some purported to be a 'loophole' to justify a refusal to comply with a FOIA request. Curative legislation of this kind does not violate the separation of powers. It is well within the General Assembly's authority. Such legislation serves the dual purpose of clarifying public policy and the intent of the law." The court then found the salary information of the Authority's employees was a public record. The court indicated that "the General Assembly was very clear about its intentions. [The legislature defines] both the sources of funding and still mandates that financial information must be fully disclosed, consistent with the duty a public body would have under FOIA. The Court finds that the Defendant must disclose the requested information as it is within FOIA's definition of 'public records.'" The Authority also argued that it should not retroactively be required to disclose records created prior to the Amendment. The court disagreed, pointing out that "the duty to produce records under FOIA applies to any and all applicable records existing on the date the request was made. The time or date when those records were created is irrelevant." (*State of Delaware, ex rel. Joseph R. Biden v. Camden-Wyoming Sewer and Water Authority*, No. 11C-08-004 (RBY), Delaware Superior Court, Kent County, Nov. 7)

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Kentucky

A court of appeals has ruled that the Bowling Green Municipal Utilities, a non-profit utility that provides water, electric and fiber optic services to the City of Bowling Green, did not violate the Open Records or Open Meetings Acts when a the general manager asked two other employees to review the merits of proposals for insurance coverage. Robert Taylor, one of the vendors not chosen for the insurance contract, claimed the Utilities' Board had accepted the recommendation of the three-man "committee" without deliberation and that the three-man group constituted a committee established by BGMU. The court disagreed, upholding both the Attorney General and the trial court. The appeals court pointed out that "the administrative functions of the employees of a public agency are not subject to either the Open Records Act or the Open Meetings Act. In the present case, the employees in question were merely asked to review bids by a member of management and there is no indication the Board either requested this action or approved it, or that the Board delegated any authority to the employees who performed this task. Rather, the task appears to have been purely administrative. This does not fall within the parameters of [either statute]. Therefore, there is no public right of access." (*Robert E. Taylor, III v. Bowling Green Municipal Utilities*, No. 2011-CA-00592-MR, Kentucky Court of Appeals, Nov. 2)

The Attorney General has ruled that a confidentiality clause in the settlement agreement between Eastern Kentucky University and Debra Hoskins, former director of the EKU Center for the Arts, does not supersede reporter Rich Copley's right of access under the Open Records Act. The University denied Copley access to the records based on the confidentiality clause and the assertion that some records were protected by the deliberative process privilege. Rejecting the University's claims, the AG noted that "the overwhelming weight of legal authority supports [Copley's] position that the confidentiality clause in the Agreement and Release is unenforceable and that the documents for which confidentiality is claimed do not enjoy protection under the Open Records Act." The AG added that "as the matter currently stands, 'there is an issue of transparency' regarding Ms. Hoskins' departure that can only be resolved by disclosure of internal audits of the Center she directed and personnel records relating to her performance as director." As to the privilege claim, the AG observed that "the records to which Mr. Copley requested access formed the basis of EKU's final action and the records thereafter forfeited whatever protection as preliminary documents they may have once enjoyed." (Order 12-ORD-201, Office of the Attorney General, Commonwealth of Kentucky, Oct. 26)

Montana

A trial court has ruled that portions of a pre-sentence report pertaining to a boating accident involving State Sen. Gregory Barkus in which Barkus pled guilty to criminal endangerment after crashing a boat and injuring four passengers, including Rep. Dennis Rehberg (R-MT), who was the Republican candidate for the U.S. Senate, must be disclosed. Barkus had asked Judge John McKeon to delay releasing the PSI, arguing that disclosure would violate the privacy rights of the witnesses. But McKeon noted that "there remains information within the PSI where the merits of public disclosure exceed any privacy interest." The court pointed out that the PSI included three victim impact statements and 24 letters supporting Barkus. McKeon observed that "the public disclosure of their statements without providing them the opportunity to be heard not only impacts their privacy rights but would violate their fundamental due process right. With the limited disclosure herein, that fundamental due process right is protected." Barkus also argued that immediate disclosure was not relevant. But McKeon pointed out that "neither this Court nor Barkus can ignore the fact that Barkus and Rehberg were public officials at the time of this offense of Criminal Endangerment, this felony offense involved serious bodily injury and knowingly engaging in conduct that created substantial risk of serious bodily injury, and that due to the contested U.S. Senate race, there remains considerable public interest regarding this offense." McKeon ordered the report disclosed with redactions for contact, background,

financial and medical information. (*State of Montana v. Gregory D. Barkus*, No. DC-09-468C, Montana Eleventh Judicial District, Flathead County, Oct. 24)

Illinois

After rehearing prisoner Kilroy Watkins' suit against the Chicago Police Department for complaint register files for two officers Watkins accused of coercing him into confessing to murder and robbery charges, the appellate court has ruled that the records do not qualify as personnel records and an *in camera* review is required to determine if the records are protected by the deliberative process privilege. Although in previous cases the supreme court had found a per se exemption for personnel records, the appeals court noted that "the [department's] affidavit described the CR files as records that are created and maintained, not by the personnel department of the Department, but by the [Internal Affairs Division]. The CR files contain a wide variety of documents and information pertaining to the initiation, investigation, and resolution of complaints of misconduct made by the public against police officers. [The affidavit] does not describe the records, in any way, as 'personnel files,' or as records maintained in 'personnel files.' Furthermore, it is not readily apparent that CR files are the type of documents that would 'reasonably be expected' to be found in personnel files." But the court added that "although we have found that the requested CR files in their entirety are not *per se* exempt from disclosure as personnel files, the CR files may contain purely personal information as to the officers that is exempt from disclosure. [The Department's affidavit] shows that CR files may include the officers' social security numbers, birth dates, employee numbers, personal health information, home addresses, and home telephone numbers. This personal information should be redacted before any disclosure of the CR files." The police had also claimed the records were deliberative. The court observed that "the affidavit does make a case that the deliberative-process exemption may apply and generally indicates what materials in each CR file may fall within the deliberative-process exemption. The affidavit, however, does not allow for adequate adversarial testing of defendant's premise that the exemption applies to the requested documents, as a whole, and certainly does not justify the withholding of the entire CR file. An *in camera* inspection is necessary to determine whether the exemption applies and, if so, to what material." The court also concluded that the Personnel Record Review Act did not prohibit disclosure of information under FOIA and that a protective order in an unrelated federal suit did not prohibit disclosure to a third party. (*Kilroy Watkins v. Garry F. McCarthy*, No. 1-10-0632, Illinois Appellate Court, First District, Nov. 5)

The Federal Courts…

A federal court in California has ordered the Justice Department to review records it claimed were non-responsive to EFF's request for records concerning the agency's attempts to expand the capability to wiretap types of communications currently not subject to the Communications Assistance for Law Enforcement Act. EFF complained that both the FBI and the DEA withheld a number of documents as **non-responsive**. Judge Richard Seeborg agreed with EFF that the agency needed to provide better justification. He pointed out that "in evaluating the propriety of the withholding of materials as non-responsive, the competing policy interests include: (1) the Government should not be discouraged from conducting broad searches to identify *potentially* responsive documents in the first instance, by then being automatically required to produce all such documents; (2) the Government should not be permitted to withhold materials not subject to any exemption merely because it would *prefer* not to disclose the information and can construct a technical argument that it is outside the scope of the request, and (3) the rules should not be set up in a way that would promote a practice of over-production, whereby requesting parties would be buried with voluminous materials of little or no relevance." The court added that "the practice of removing individual

pages, or redacting parts of pages, likely serves no purposes of efficiency other than to permit the Government to defer determining whether a specific exemption might apply. At least in theory, a requester could simply submit a new request for production of any materials withheld as non-responsive, at which point the Government would be required to make that determination in any event." Seeborg ordered the agency to review the non-responsive records and indicated that "the presumption should be that information located on the same page, or in close proximity to undisputedly responsive material is likely to qualify as information that in 'any sense sheds light on, amplifies, or enlarges upon,' the plainly responsive material, and that it should therefore be produced, absent an applicable exemption. That said, there is no presumption that *all* materials initially identified as 'potentially responsive' necessarily must be produced." EFF complained that the FBI's *Vaughn* index was inadequate, but agreed that the DEA's *Vaughn* index provided a sufficient level of detail for meaningful review. EFF urged Seeborg to order the FBI to provide a *Vaughn* index more like the one submitted by the DEA. Seeborg, however, observed that "the law does not require that *Vaughn* indices conform to any specific format or organizational requirements and the fact that the DEA may have chosen an approach that EFF prefers does not impose any obligation on the FBI to utilize an identical template. The FBI remains free to structure its *Vaughn* index and supporting declaration in some other manner. Nevertheless, the existing index is insufficient to provide an adequate foundation for review of the soundness of the exemption claims. Accordingly, the FBI is directed to provide a revised index as promptly as practical, making a good faith effort to address the issues raised by EFF." (*Electronic Frontier Foundation v. Department of Justice*, Civil Action No. 10-4892 RS, U.S. District Court for the Northern District of California, San Francisco Division, Oct. 30)

A federal court in California has ruled that while the Department of Homeland Security's central FOIA office conducted a reasonable **search** in response to a request from the ACLU of Southern California for records concerning a work-site enforcement operation at Terra Universal, Inc. that involved a worker named Andrade Castillon, Immigration and Customs Enforcement has not shown that it conducted a proper search. The ACLU complained that DHS had not adequately described its search of the Office of Policy and that it had failed to search of Office of the Inspector General. But the court found that "DHS's [supplemental affidavit] explains that at least five different officials searched both emails and shared folders using the search terms 'Terra,' 'Universal,' and 'Terra Universal' in the Office of Policy and its subcomponent Office of Immigration and Border Security. DHS also explained why the Office of Policy was unlikely to have responsive records regarding the other topics of the FOIA request." Turning to the search of the Inspector General's Office, the court pointed out that "the reasonableness of an agency's decision regarding which components to search depends on a reasonable construction of the FOIA request, not upon documents never provided to the agency's FOIA office. Here, Plaintiff requested records regarding Terra Universal, and set out specific subcategories. None of those categories concerned internal investigations of alleged DHS employee misconduct." However, ICE's search did not fare so well. The court observed that "with respect to Defendants' searches for documents related to Mr. Andrade, Defendants' offices used vastly different search terms and several offices neglected to use variations that were very likely to yield results." The court added that "even with ICE's supplemental productions and *Vaughn* index, it remains unclear whether or not all of ICE's redactions are justified. Both Plaintiff and the Court are entitled to information to properly evaluate the propriety of the asserted redactions. In short, review of the record raises 'substantial doubt' as to the adequacy of the search, particularly in view of positive indications of overlooked materials. . ." (*ACLU of Southern California v. United States Department of Homeland Security*, Civil Action No. 11-10148 ODW (jcx), U.S. District Court for the Central District of California, Western Division, Oct. 25)

Judge John Bates has ruled that a document discussing legal representation for several Bureau of Prisons employees is protected under **Exemption 5 (attorney-client privilege)**. Bates pointed out that "the

question hence arises 'whether privileges are a two-way street, for example, as a holder of the attorney-client privilege, may the client bar testimony not only of what the client told the attorney but also of what the attorney told the client.' Courts now overwhelmingly agree that the privilege protects some statements by the attorney, although they vary 'as to the precise extent of the application of the privilege to the professional's statements.'" Bates then noted that "applying that framework to the documents at issue here, the letters from Bureau of Prisons employees requesting legal representation are protected from disclosure. They are 'confidential communications from clients to their attorneys made for the purpose of securing legal advice or services,' which 'the attorney-client privilege protects' categorically, regardless of the confidentiality of the information the communications contain." However, he observed that "the analysis differs for the final document, an email from an attorney to several employees. Because it is an attorney's communications to his clients, the email. . .is only privileged if it rests on confidential information obtained from the clients. This email generally does not rest on such information, and is hence subject to disclosure. . .[H]owever, one sentence of the email almost certainly rests on confidential information obtained from the client. . .Because this sentence is separable from the remainder of the email, which is not itself privileged, redaction is appropriate." (*Robert A. Zander v. Department of Justice*, Civil Action No. 10-2000 (JDB), U.S. District Court for the District of Columbia, Oct. 31)

Information Items…

Agency Asks EFF to Return Records from FOIA Request

EFF Attorney Jennifer Lynch has posted a description of her experience with ICE concerning records it originally disclosed to EFF pursuant to its FOIA request concerning the government's attempts to expand the capability to wiretap types of communications currently not subject to the Communications Assistance for Law Enforcement Act. Lynch writes that the records showed that companies like Comcast, T-Mobile and other carriers "either pushed back on or failed to comply with specific requests for information on their customers. For example, in response to one of ICE's pen register/trap and trace orders, Southern Linc said it 'did not like the wording of [the] order' and 'would not give "real time" ping location for [the] phone, [it] would only give 1 hour old history." According to the ICE records, the agency experienced "technical issues . . .on almost a daily basis' trying to get data on a suspect from Cricket Communications." Comcast also took a month before turning over an IP log history in response to an ICE request. While Lynch applauded ICE for disclosing these records in the first place, she said the agency subsequently refused to turn over similar information the agency appeared to record regularly on standardized forms sent to a central fax number, saying the request was too broad. ICE took nearly a year to address the narrowed request and still insisted it would be too burdensome to search for the records. ICE also told EFF that it should not have disclosed the original records in the first place and wanted EFF to give them back. Lynch said by that time the records had already been public for more than six months as exhibits in their litigation. Lynch noted that "this is yet another example of the federal government failing to comply with the letter and spirit of the Freedom of Information Act—reverting to secrecy when it should be promoting transparency. It's hard to imagine what harm could come from the release of these documents. ICE was careful to block out any information in the records that would identify the target of the investigation, and the information that isn't blocked out seems to reinforce the government's position on CALEA." She added that "it's another disappointment from an administration that lauded its commitment to transparency on the first day the President took office four years ago. We can only hope that if the President wins this tight election, he'll use the next four years to fulfill this commitment."

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