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Washington Focus: Both the House Science Committee and CREW have asked EPA Inspector General Arthur Elkins to investigate allegations that EPA administrator Lisa Jackson used an email account under an alias in an attempt to circumvent disclosure under FOIA. In a Nov. 15 letter to Elkins, Committee Chair Rep. Lamar Smith (R-TX) indicated that "the use of alias accounts that are not known to staff responsible for retaining and providing access to records seriously causes me to question the fidelity of previous responses to not only the public through FOIA, but also to the Office of the Inspector General as well as Congress."

Evidence of State Agency Misconduct Doesn't Meet Public Interest Standard

In yet another example of the insidious effect of the Supreme Court's ruling in *Reporters Committee* more than 20 years ago, the Sixth Circuit has ruled that the FBI properly redacted records concerning its investigation of Michael Rimmer, who was tried and convicted in state court for the murder of Memphis motel clerk Ricci Ellsworth, under Exemption 7(C) (invasion of privacy concerning law enforcement records) and Exemption 7(D) (confidential sources). Although the FBI records showed for the first time that an eyewitness was unable to identify Rimmer from a photo line-up on two occasions, the Sixth Circuit concluded that because Tennessee should have been responsible for providing Rimmer with the potentially exculpatory evidence, its disclosure at this time was not in the public interest because it did not reveal any misconduct on the part of a federal agency.

Ellsworth's death was initially investigated as a part of the FBI Safe Streets Task Force. The eyewitness twice identified Billy Wayne Voyles during FBI photo line-ups as one of two men he saw in the motel office but he never identified Rimmer. The results of those line-ups were sent to the Memphis SSTF office.

Nevertheless, Rimmer was convicted in state court and sentenced to death, at which time the federal investigation was closed. While preparing for post-conviction proceedings,

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Rimmer discovered the existence of the FBI records As a result he filed a FOIA request with the FBI for all records concerning the murder investigation. The FBI located a file on Rimmer and disclosed 82 pages in full and 704 pages with redactions. Rimmer filed suit, challenging the exemption claims and arguing that he also had a right of access under both the Administrative Procedure Act and the Mandamus Act. The trial court found Rimmer had no APA or Mandamus Act right of access because he already had a sufficient remedy under FOIA. After reviewing the redacted records *in camera*, the court also upheld the agency's exemption claims. Rimmer then appealed to the Sixth Circuit.

The FBI had withheld some information under both Exemption 6 (invasion of privacy) and Exemption 7(C). Noting that 7(C) provided broader protection, the trial court grouped the records withheld under Exemption 6 with those withheld under Exemption 7(C) and analyzed them all under 7(C). The Sixth Circuit noted that "we agree with this strategy. While Exemption 7(C) has a threshold requirement that the documents at issue be compiled for law enforcement purposes, once this prerequisite is met, Exemption 7(C) allows an agency to withhold a broader range of information than Exemption 6. . . Because it is undisputed that all the redactions at issue were contained in FBI records compiled for the purpose of law enforcement, the district court correctly applied the more protective standards of Exemption 7(C) to both the government's Exemption 6 and Exemption 7(C) redactions."

After *in camera* review, the trial court had concluded that the information redacted under 7(C) "consisted of names and other identifying information of various individuals associated with the investigation of Ellsworth's murder." The Sixth Circuit pointed out that a "privacy interest exists not only for those who are suspects in an investigation, but also for third parties mentioned in the documents, such as witnesses, informants, and investigators." To overcome this privacy interest, the court indicated Rimmer needed to show that the public interest in disclosure outweighed the inherent privacy interest. To do so, Rimmer originally argued that his need to develop exculpatory evidence constituted a sufficient public interest in disclosure. But the trial court rejected this argument, calling it "illegitimate." The Sixth Circuit agreed. "This court has made it clear that the purpose of FOIA is not to act as a 'substitute for the normal process of discovery in civil and criminal cases' and will not turn the purpose of advancing private litigation into a public one."

Abandoning that argument on appeal, Rimmer instead claimed disclosure would reveal wrongdoing on the part of the Justice Department. The Sixth Circuit pointed out that Rimmer was required to provide more than mere speculation. But the court slammed the door shut immediately, noting that "FOIA is concerned only with shedding light on misconduct of the *federal* government, not *state* governments. As numerous sister circuits have noted, 'it is beyond question that FOIA applies only to federal and not to state agencies.' Accordingly, we agree with the Third Circuit that 'just as there is no FOIA-recognized public interest in discovering evidence in federal government files of a private party's violation of the law, there is no FOIA-recognized public interest in discovering wrongdoing by a *state* agency.'" The court explained that "in this case, Rimmer argues that the FBI withheld and is still withholding exculpatory information relating to his conviction for Ellsworth's murder. It is true that, if the *federal* government had prosecuted Rimmer, it would have had an obligation under *Brady v. Maryland* to provide him with any exculpatory information in its possession. Here, however, the FBI declined to prosecute Rimmer, who was prosecuted by Tennessee only. Thus, while the *state* may have breached its *Brady* obligations by failing to provide Rimmer with evidence of the. . .photo-lineup identification, Rimmer presents no evidence that the FBI had any similar obligation."

The court added that the only information being withheld under Exemption 7(C) was identifying information. "At bottom," the court noted, "even if a significant public interest were actually to exist, the information Rimmer seeks does not serve that interest. Rimmer acknowledges that he is already in possession of most of the information that he now seeks. . .[E]xposure of this information would not help the public to

discern whether the FBI was acting corruptly. . .[A]ll that exists is the deletion of information that would identify those who were mentioned in the Ellsworth investigation file."

The court rejected Rimmer's challenge to the redaction of confidential source information under Exemption 7(D). The court pointed out that "the district court correctly dispensed with Rimmer's claim that his personal knowledge of the identity of most of the government's confidential sources neutralized the personal-privacy protection afforded them under Exemption 7(D). In this circuit, it is well-settled that 'if a confidential source is later revealed, we nonetheless restrict public access to documents under [Exemption 7(D)] so long as the informant and the agency intended the identity of the sources to remain undisclosed at the time the agency compiled the information.'"

Rimmer argued that the district court's ruling against him in his FOIA suit showed FOIA did not provide him with an alternative adequate remedy. But the court observed that "Rimmer's argument is misplaced, however, and is premised on a misunderstanding of the term 'adequate remedy.' Adequacy does not depend on a party's ability to prevail on the merits—if it did, every party that lost a non-APA-based appeal of an agency decision would be entitled to a duplicative APA claim. . ." The court indicated that 'in this case, the district court's ability to conduct a *de novo* review of Rimmer's FOIA request and, if it were to rule in Rimmer's favor, to order relief identical to that provided under the APA, *i.e.* production of the unredacted documents Rimmer seeks, clearly provides an alternative adequate remedy in court. . ."

The court noted that "this outcome is especially appropriate because Rimmer could have obtained review under the APA rather than FOIA if, instead of seeking the documents at issue through FOIA channels, he had pursued a *Touhy* request, a common tool for obtaining federal documents during state-court discovery." The court added that "had Rimmer, rather than employing FOIA, made a *Touhy* request pursuant to [agency] regulations and been denied, he would now be able to seek precisely the remedy he now demands: review under the APA." (*Michael Dale Rimmer v. Eric H. Holder, Jr.*, No. 11-6286, U.S. Court of Appeals for the Sixth Circuit, Nov. 21)

Views from the States…

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

California

A court of appeals has ruled that the pending litigation exemption does not apply to billing and payment records reflecting the amount of money the County of Los Angeles paid in attorney's fees to defend itself against a pending civil rights action. The trial court had ruled that, while some records were protected as attorney work product, neither the attorney-client privilege nor the pending litigation exception applied. The court noted that "the trial court reasonably found that, based on the evidence before it, the records in question were not prepared for use in litigation as that term is explained in appellate [case law]. This is true even though the records in question *relate* to pending litigation and, indeed, would not have existed but for the pending litigation." The court added that "at best, this case presents the 'dual purpose' situation described in [the appellate precedent]. As such, the trial court was required to determine the dominant purpose for the preparation of the records." The court pointed out that "the documents that the trial court ordered produced were the invoices to the County's law firm in the [civil] action, the payment records to the firm, and, as

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redacted to exclude work-product information, the time records of the firm for that matter. The trial court found that the documents 'were prepared in connection with [the civil action] but not specifically for use in that case. . .A fair reading of these findings is that the court concluded the dominant purpose for preparing the documents was not for use in litigation, but as part of normal record keeping and to facilitate the payment of attorney fees on a regular basis. That such documents may have an ancillary use in litigation—for example, in connection with a request for attorney fees—does not undermine the substantial evidence before the trial court that the dominant purpose of the records was not for use in litigation." (*County of Los Angeles v. Superior Court of Los Angeles County*, No. B239849, California Court of Appeal, Second District, Division 8, Nov. 16)

Pennsylvania

A court of appeals has ruled that a license inspection summary issued by the Department of Welfare to a day-care provider is protected by the non-criminal investigation exemption. George Michak, the attorney for Little Steps Day Care, requested the summary in an administrative proceeding challenging the agency's decision to issue the day care provider a provisional certificate of compliance and to revoke its regular certificate. He also requested the summary under the Right to Know Law. The agency invoked the non-criminal investigation exemption and suggested as well that Michak was abusing the discovery process. Michak appealed the agency's decision to the Office of Open Records, which affirmed the exemption claim without reference to the discovery issue. Michak then filed suit. Michak argued the summary fell within an exception that allowed disclosure where such records modified or revoked an existing license or certificate. But the court agreed with the agency that "a LIS describes deficiencies in a licensee's compliance with the relevant statute and regulations, and provides space for the licensee to set out a plan of correction. However, the LIS does not affect or change a licensee's certificate of compliance. The Department issues sanction letters to revoke or modify certificates of compliance." Michak also argued the agency published essentially the same information on its website. The court rejected that argument, noting that "where a requestor requests a specific type of record, the requestor may not, on appeal, argue that an agency must instead disclose different records in response to the request. To allow a requestor to do so would render meaningless the obligation of an agency to respond specifically to a request and would deny the agency the opportunity to specifically state, in the first instance, its grounds for denying the disclosure of the newly-sought documents." (*George A. Michak v. Department of Public Welfare*, No. 2318 C.D. 2011, Pennsylvania Commonwealth Court, Nov. 9)

Texas

A court of appeals has ruled that the Texas State Board of Pharmacy is not required to disclose a patient's own prescription record when it is part of a confidential investigatory file. The case involved a complaint to the Pharmacy Board from Ardeshir Ashtiani against a pharmacist who refused to fill his valid prescription. Ashtiani then requested the Board's investigative file relating to the pharmacist. The Board refused, saying that its investigative files were confidential under the Pharmacy Act. The Board asked the Attorney General's Office for its interpretation and the Attorney General upheld the exemption, but concluded that Ashtiani had a right to his own prescription record under the Medical Practice Act. The Board filed suit against the Attorney General and the trial court ruled in the Board's favor. The Attorney General then appealed. The appellate court noted that the Medical Practice Act ensured confidentiality of medical records while allowing patients to access their own records. But the court pointed out that "statutory rights aimed at limiting access to information are simply not the same as rights aimed at compelling access to information. Accordingly, we conclude that the medical practice act does not provide a patient with a general 'special right of access' to his or her medical records." The court acknowledged that under the Public Information Act, individuals had a special right of access to records about them held by agencies, but explained that "a governmental body 'may assert as grounds for denial of access other provisions of the [PIA] or other law that

are not intended to protect the person's privacy interest.'" The court then observed that "like similar investigative-privilege provisions, [the confidential provision in the Pharmacy Act] is primarily designed to protect the integrity of the Board's regulatory process. Consequently, the Board's withholding of the requester's prescription record is based on law that is not intended to solely protect the privacy interest of the requester. In this case, the requester does not have a special right of access to his prescription record under [the PIA]." (*Greg Abbott v. Texas Board of Pharmacy*, No. 03-11-00481, Texas Court of Appeals, Austin, Nov. 21)

The Federal Courts…

After an *in camera* review, Judge James Boasberg has ruled that documents for which the Department of Health and Human Services had invoked **Exemption 5 (privileges)** are indeed protected by various privileges. The case involved a suit by the National Whistleblower Center for records concerning the alleged retaliatory actions FDA took against several staff members when they complained about improper approval of medical devices. The Center argued that Exemption 5 could not be claimed when there was a factual basis for showing that government misconduct occurred. The Center also contended the agency was required to disclose factual material from the documents. The agency argued that the government misconduct exception did not apply in FOIA cases. But Boasberg pointed out that "there is no authority supporting [the agency's] contention that the government-misconduct exception does not apply in FOIA cases." Instead, he observed that "the government-misconduct exception may be invoked to overcome the deliberative-process privilege in a FOIA suit." The Center focused on a letter from the Office of Special Counsel indicating that "there is a substantial likelihood that the information you provided discloses a violation of law, rule, or regulation, gross mismanagement, and a substantial and specific danger to public safety." HHS argued the letter showed only that the allegations were under investigation. Boasberg noted that "while there is little caselaw to guide the Court on what quantum of evidence must be shown to support the exception, the Court finds that the OSC letter. . .suffice[s] to justify *in camera* review of the documents withheld pursuant to Exemption 5. The Court, it bears noting, did not weigh the evidence and find *release* of the documents warranted, only *in camera* review, which is a significantly lower threshold." But after reviewing the records *in camera*, Boasberg concluded that they were protected. He explained that "the withheld documents reviewed by this Court here do not approach the level of misconduct contemplated by [relevant cases] with respect to either improper approval of medical devices or retaliation against FDA employees. Instead, documents here involve the typical deliberations that the court would expect of government actors and do not evince the sort of corrupt decision-making process that would not support an exception to Exemption 5. The Court, it should be stressed, makes no determination as to the ultimate question of the lawfulness of Defendant's actions; it merely finds that the misconduct necessary to supersede the deliberative-process privilege of Exemption 5 is not present in the reviewed documents." Boasberg found the agency's affidavits sufficient to support withholding, but noted that "even if it fell short, the Court has independently reviewed the documents *in camera* for the government-misconduct analysis and is satisfied that Defendant complied with its duty to segregate exempt from non-exempt information in the records withheld or redacted under Exemption 5." Boasberg turned down the Center's request for further discovery. He observed that 'Plaintiffs have essentially obtained the discovery they sought because the Court agreed to conduct *in camera* review. In other words, without discovery, they had articulated a sufficient factual basis to warrant *in camera* review. Having obtained that review, there is nothing else discovery could offer them." (*National Whistleblower Center v. Department of Health and Human Services*, Civil Action No. 10-2120 (JEB), U.S. District Court for the District of Columbia, Nov. 9)

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Judge Ellen Segal Huvelle has ruled that the Transportation Department has not yet shown that it conducted an **adequate search** for records concerning the recall of an Evenflo Discovery car seat. Safety Research & Strategies requested both internal and external communications between the agency and third parties. The National Highway Traffic Safety Administration searched its records, located 158 pages, and released 54 pages. Safety Research appealed and NHTSA's chief counsel agreed that the original search had not been comprehensive enough because it did not look for internal communications. A second similar search was conducted which yielded an additional 641 pages, of which 23 were withheld. Safety Research filed suit, challenging the agency's search. Safety Research argued the search instructions for the second search were virtually identical to that of the first search, and since the first search had been found inadequate on appeal, the second search must implicitly still be inadequate. Huvelle agreed that the search instructions were superficially the same, but noted that "although the two searches employed the same methodology, they did in fact differ in scope. Specifically, in its initial search, NHTSA erroneously interpreted plaintiff's request as encompassing external communications between NHTSA and Evenflo, but not internal communications within NHTSA relating to the Evenflo matter. Before the second search, however, the agency acknowledged that plaintiff's request included all of NHTSA's internal correspondence relating to the Evenflo matter, and as a result, it expanded the scope of the remanded search to include those materials." Huvelle, however, agreed with Safety Research that the agency had failed to identify its search terms, sending the request to ten staffers who might have responsive records. Although the agency argued its ability to use keyword searches was hampered by the lack of any central database, Huvelle pointed out that "the Court is aware of no caselaw. . . suggesting that search terms are unnecessary where the agency does not have a central searchable database. The need to disclose the search terms used to identify responsive documents may be equally—if not more—important where the agency lacks a centralized database and the searches were therefore done by individual document custodians." Under the circumstances, Huvelle also agreed with Safety Research that the released records suggested the existence of other responsive records that had not been located. She observed that "the Court cannot state with confidence that the 'methods used to carry out the search' were in fact 'appropriate' based on the declarations provided by the agency. Thus, when combined with NHTSA's failure to provide the search terms used by nine of the ten potential document custodians, the Court finds that the unlikely absence of *any* external communications between NHTSA and Evenflo supports summary judgment for plaintiff." (*Safety Research & Strategies, Inc. v. U.S. Department of Transportation*, Civil Action No. 12-551 (ESH), U.S. District Court for the District of Columbia, Nov. 8)

A federal court in Pennsylvania has awarded David Baker $9,400 in **attorney's fees** for his FOIA litigation against the Secret Service. Baker, a Secret Service employee, asked for records related to his employment dispute with the agency pertaining to his service in the Navy Reserve. Baker requested the records in April 2009, and although the agency informed him in July 2010 that responsive records were undergoing final review, the agency did not disclose any records until April 2011, three weeks after he filed suit. He received 1,800 pages with multiple exemption claims with no substantive explanation. In January 2012, the court upheld the agency's claims, but ordered it to produce a *Vaughn* index. After receiving the *Vaughn*, Baker filed for attorney's fees. Baker claimed he had substantially prevailed because the court had ordered the agency to provide a *Vaughn* index. But the court observed that "because an order compelling the production of a *Vaughn* index is not court-ordered relief for Baker, he has not substantially prevailed by obtaining relief through a judicial order and is ineligible to receive attorney's fees on that ground." But the court agreed with Baker that filing suit caused the agency to respond to his request more quickly. The court pointed out that "Baker did not receive any communication with the Secret Service. . .between July 2010. . .and March 2011, when he filed this action. . .Under these circumstances, Baker's commencement and prosecution of this action can reasonably be regarded as necessary to obtain the requested information from the agency." The court added the "he has shown a causal nexus between this action and the release of the

requested information and, accordingly, has proven that he substantially prevailed because of a voluntary or unilateral change in position by the Secret Service. Therefore, he is eligible for attorney's fees in this case." Addressing the four factors for entitlement to a fee, the court observed that "although Baker's FOIA request encompassed information relating to his dispute with the Secret Service, the release of information in this case, especially viewed in light of his [Merit Systems Protection Board] victory, is likely to assist military personnel working within the federal government." The court indicated that Baker's request was not commercial or even personal in nature. "Baker's motive in litigating this case under FOIA was not commercial, but rather investigatory. . .[H]e sought to uncover information relating to the agency's potentially discriminatory action of requiring certain personnel to change their military designation status—information that was likely to assist military personnel working within the federal government." Because the agency took so long to respond to Baker and failed to provide a comprehensive explanation of its exemption claims, the court concluded that "there is ample evidence that the agency was recalcitrant or obdurate in releasing the requested information to him." (*David M. Baker v. United States Department of Homeland Security*, Civil Action No. 3:11-CV-588, U.S. District Court for the Middle District of Pennsylvania, Nov. 20)

Judge Richard Leon has wrapped up what remained of Christopher Earl Strunk's suit against the Department of State and U.S. Customs and Border Protection regarding travel records on President Barack Obama's mother, Stanley Ann Dunham by find that CBP properly invoked **Exemption 7(E) (investigatory methods and techniques)** to withhold her travel records from its TECS database. The agency argued that its border crossing information was a subset of the TECS database and Leon accepted that TECS was a database containing records compiled for law enforcement purposes. He then concluded that "although the computer transaction and function codes are not themselves 'techniques and procedures for law enforcement investigations or prosecutions' entitled to categorical protection under Exemption 7(E), the CBP's declarant adequately demonstrates that release of the codes, as well as the information in the [results of specific law enforcement inquiries] column, 'would disclose guidelines for law enforcement investigation or prosecutions [and that] such disclosure could reasonably be expected to risk circumvention of the law.' The CBP thus demonstrates that its decision to withhold the TECS-related information under Exemption 7(E) is proper." (*Christopher Earl Strunk v. United States Department of State*, Civil Action No. 08-2234 (RJL), U.S. District Court for the District of Columbia, Nov. 20)

Judge Richard Roberts has ruled that the Department of Veterans Affairs and the Office of the Director of National Intelligence have shown that they have no record of receiving FOIA requests from Rory Walsh, but that the FBI has not yet shown that Walsh failed to appeal the agency's denial of his request. Walsh alleged he had been harassed for years by former Marine Corps commandant Michael Hagee. He requested a copy of an allegedly false medical evaluation from the VA office in Wilmington, Delaware. The Wilmington office searched its list of FOIA requests for receipt of Walsh's request, as did VA offices in Philadelphia and Lebanon, Pennsylvania, but none of the offices found any indication that Walsh had submitted a FOIA request. The agency also contacted the Release of Information office, which handles requests from veterans for their own medical records, but found no indication that Walsh had made a request. Roberts noted that "Walsh has submitted no proof that he mailed this request, or that the VA received it. The VA has presented undisputed evidence that it searched for Walsh's FOIA request in the places that Walsh's FOIA request to the VA would have been located, but did not discover any such request. Thus, either Walsh never properly initiated an exhausted the FOIA administrative process, or if he did send a valid request, the VA has shown that it does not have the request and the request was not exhausted." As for the ODNI, the office reviewed a listing of the FOIA requests it received but found no request from Walsh. Rogers indicated that "ODNI conducted a search reasonably calculated to locate Walsh's alleged FOIA request and did not discover any

such request." The FBI denied Walsh access to the name of the director of its Harrisburg, Pennsylvania field office. Walsh alleged he had appealed that decision, but the FBI told the court it contacted OIP and confirmed that OIP had no record of receiving Walsh's appeal. But Roberts pointed out that "the FBI does not provide factual detail to show that its searches for Walsh's responses were reasonably calculated to find his response, nor does the FBI provide any evidence, such as a return receipt, that would resolve the factual dispute about whether it mailed Walsh [a letter explaining that it had rejected his request]. Therefore, the FBI's motion for summary judgment will be denied." (*Rory Walsh v. Federal Bureau of Investigation*, Civil Action No. 11-2214 (RWR), U.S. District Court for the District of Columbia, Nov. 21)

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