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

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Washington Focus: The Senate Judiciary Committee has unanimously approved "very overdue" amendments to the Electronic Communications Privacy Act requiring the government to obtain a probable-cause search warrant from a judge in order to gather email messages from service providers. Sen. Patrick Leahy (D-VT) sponsored the amendment and noted that "after decades of the erosion of Americans' privacy rights on many fronts, we have a rare opportunity for progress on privacy protection." Applauding the new amendment, Sophia Cope, director of government affairs at the Newspaper Association of America, observed that "this is a good step in trying to create a buffer between law enforcement and reporters and their newsgathering. It's a really important step and is long overdue. Technology has completely outpaced the law, so it's time to update it.". . .The Air Force and the National Guard have adopted a policy requiring that all agency records be converted to a PDF format or image-based format before they are publicly released. Critics claim the policy impermissibly limits the ability to use such records electronically. DOD spokesman David Oten agreed with critics, noting in an email that "this could be contradictory to the FOIA itself."

Court Chides Agency For Poor Handling of FOIA Request

Judge James Boasberg has blasted U.S. Citizenship and Immigration Services for its poor handling of a FOIA request submitted by the American Immigration Council, but although he found the agency's work exceedingly sloppy, he also found that some of the agency's responses were appropriate.

The Council asked for records concerning the role of counsel in immigration proceedings. After eight months without a determination, the Council filed suit. Three months later, USCIS responded by releasing 455 pages in full and 418 pages in part. The agency withheld 1169 pages. By the time Boasberg ruled on the case, he was able to confirm the agency's Exemption 6 (invasion of privacy) claims because the Council had not addressed them. But the Council's challenges to the search and to withholdings under Exemption 5 (privilege) remained.

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The Council challenged the way in which the agency selected the offices to be searched as well as the searches themselves. The agency explained that because the request was considered complex it was referred to the Significant Interest Team, which identified five offices to be searched. The Council argued the agency had failed to explain why it limited its search to only five offices and suggested that the Fraud Detection and National Security Directorate also dealt with access to counsel issues. But, calling the issue "close," Boasberg agreed that the agency's search criteria were adequate. He noted that "USCIS's methodology—comparing the FOIA request to program offices' functions deduced from 'sources containing organizational and operational information about the agency and its various components, such as a reference guide'—is sound. USCIS could justifiably conclude that the Fraud Detection and National Security Directorate probably did not hold responsive records because its functions seem far removed from access-to-counsel issues."

But Boasberg then noted that "once the searches moved to the program offices, however, the [agency affidavit's] detail thins. [The agency] explains that each chosen program office 'was tasked to conduct a search for documents responsive to AIC's FOIA request.' [It] adds that each office 'conduct[ed] the search in the manner it deem[ed] most appropriate and best calculated to locate records responsive to the specific FOIA request.'" He continued: "And that's it. The [affidavit] says nothing about what kinds of records the offices keep, which records or databases the office searched through, or how the offices conducted their searches. Indeed [the writer of the affidavit] seems not to know what the chosen program offices did after receiving the requests. The [affidavit] says only that the chosen offices turned responsive records over to the Significant Interest Team." He observed that "[the agency's affidavit] gives this Court no way to know if the chosen offices conducted adequate searches with reasonable methods." As a result, he indicated: "The Court cannot yet say whether the search was adequate, but [the agency's affidavit] certainly was not."

The Council next contended that "most—if not all" of the *Vaughn* index explanations for withholding records under Exemption 5 were conclusory. Boasberg was inclined to agree and, as a result, ordered USCIS to produce 15 contested records for *in camera* review. Criticizing the agency for submitting a *Vaughn* index riddled with mistakes, Boasberg indicated that "the errors in the form of the index turn out to be the least of USCIS's woes here. Having now examined the withheld records, the Court concludes that most of the challenged Exemption 5 withholdings were improper, although the reason that USCIS was wrong changes with each record. The variety in errors suggests that USCIS, although it invoked Exemption 5 often, did not grasp even the basic points of this Exemption."

Looking first at claims of the deliberate process privilege, Boasberg pointed out that "a 'strong theme' of this Circuit's decisions on the deliberative-process privilege 'has been that an agency will not be permitted to develop a body of "secret law," used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as "formal," "binding," or "final."' Yet USCIS repeatedly casts records as predecisional when they actually convey what the Agency's policy-makers have decided."

Boasberg began to examine the records. Addressing PowerPoint slides for training agency employees about interacting with attorneys, he noted that "these training slides are neither predecisional nor deliberative. A training is not a step in making a decision; it is a way to disseminate a decision already made." He next examined a series of emails between USCIS employees and the liaison for the American Immigration Lawyers Association. He pointed out that "the e-mail chain begins with the liaison asking USCIS employees to clarify specific agency policies and practices, and follows with the employees' responses, which are meant to be distributed to lawyers in the AILA. Most of these e-mails are not 'inter-agency or intra-agency memorandums or letters,' flunking the threshold requirement for Exemption 5." The next record consisted of two documents given to immigrants by USCIS. Boasberg observed that "both of these documents were distributed to the public, they (1) are not intra-agency or inter-agency records, thus failing Exemption 5's threshold requirement,

and (2) represent settled USCIS policy, not fluid policy that still must congeal." As to another record informing employees about a new policy, Boasberg indicated that "by including a long list of employees on the e-mail, moreover, the supervisor seems to aim to inform many employees (not just the one in charge of posting the notice) about the new policy. On the other hand, because the e-mail precedes the posting, arguably the decision has yet to reach its final culmination. The e-mail, moreover, encourages employees to contact the supervisor with any questions about the policy. At the end of the day, the Court concludes that even if some facts suggest that the e-mail is predecisional, it is not deliberative. There is no hint that the supervisor is still weighing her options or wants feedback from the employees; asking if employees have *questions* is not the same as asking if they have *suggestions*."

USCIS had also claimed the PowerPoint slides used to train employees about interacting with private attorneys were protected by the attorney-client privilege. But Boasberg pointed out that "because these slides are a communication for attorney to client (here, USCIS), they are confidential only insofar as they rest on confidential information obtained from the client. USCIS offers no explanation of what confidential client communications might underlie these slides, and the slides themselves do not hint at underpinning confidentialities. Nor should they, the slides were used for general trainings by USCIS lawyers, and such generally applicable legal advice will rest on none of the factual particularities conveyed in a typical confidential communication by a client." (*American Immigration Council v. United States Department of Homeland Security*, Civil Action No. 11-1971 (JEB), U.S. District Court for the District of Columbia, Nov. 27)

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 City of Fort Smith did not violate FOIA when city administrator Dennis Kelly circulated a proposal to give him authority to fire or hire department heads without Board approval to a majority of the Board of Directors. The proposal was discussed during an open Board study session but was not placed on the agenda for a regular meeting. Joey McCutchen filed suit, arguing that circulating the proposal constituted improper one-on-one meetings. The trial court ruled not only that the discussion did not violate the open meetings provisions of FOIA, but that restrictions on such discussions violated the Board members' First Amendment rights. McCutchen appealed to the supreme court, arguing that the discussion of the proposal was prohibited by an earlier supreme court decision, *Harris v. City of Fort Smith*, in which the supreme court concluded the Board could not hold one-on-one meetings to affirm a prior decision to buy a piece of property at auction. The court noted that "in *Harris*, the one-on-one meetings between the City Administrator and the Board members ran afoul of the FOIA because the purpose of the meetings was to obtain approval of action to be taken by the Board as a whole. . .In this case, the purpose of Kelly's memorandum was to provide background information on an issue that would be discussed at an upcoming study session." The court added that "Kelly did not solicit responses from Board members in the memorandum, and there is no evidence that the issue was discussed or debated prior to the study session. Furthermore, there is no evidence that the Board members exchanged any correspondence about the memorandum." Turning to whether or not the open meeting restrictions were unconstitutional, the court pointed out that "it is evident to this court that appellees have an argument with the legislature, but not one that amounts yet to a case or controversy that should be decided by a court." The court observed that "instead of

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taking their argument to the legislature, appellees sought—and received—a legal opinion from the [trial] court rather than the resolution of an actual controversy. We have long held that courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct." (*Joey McCutchen v. City of Fort Smith*, No. 11-1086, Arkansas Supreme Court, Dec. 6)

Kentucky

The Attorney General has ruled that records concerning University of Kentucky student athlete Nerlens Noel are protected by the Family Educational Rights and Privacy Act. The University argued that Noel's athletic activities were clearly part of his educational records. The AG reluctantly agreed, relying on the Ohio Supreme Court's recent decision in *ESPN v. Ohio State University*. The AG noted that "relying on the Sixth Circuit Court of Appeals' expansive definition of the term 'education records' in *United States v. Miami University* (2002), the court rejected the claim that records relating to an NCAA investigation of student athletes were not 'education records,' emphasizing that 'the plain language of the statute does not restrict the term "education records" to "academic performance, financial aid, or scholastic performance" and 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.' Notably, the court opined, 'Congress made no content-based judgments with regard to its "education records" definition.'" The AG added that "it is on this basis that we affirm the University of Kentucky's denial of the [student newspaper's] open records request. Since we were unable to review the relevant documents *in camera*, we rely on the University's interpretation and application of federal law, and its professed appreciation for the value of transparency, to ensure that public records are not improperly withheld in the name of student privacy." (12-ORD-220, Office of the Attorney General, Commonwealth of Kentucky, Dec. 4)

Mississippi

The supreme court has ruled that there is not sufficient public interest in a confidential settlement between Ford Motor Company and two individuals involved in an accident in a Ford vehicle to require its disclosure. The court also found that the policy encouraging settlements favored keeping the agreement confidential. Although the settlement included a confidentiality clause, the trial court concluded that the public interest in knowing about the cost of the settlement required that it be disclosed. The supreme court noted that "although the public has a right of access to public records, Mississippi law also favors the settlement of litigants' disputes and respects confidentiality agreements when practical. The law allows courts to determine when information should be declared confidential or privileged, exempting it from the Public Records Act. Because this settlement agreement is between private parties, does not involve matters of public concern, and is not necessary to resolve the fee-dispute claim, its confidentiality should be preserved." (*In the Matter of the Estate of Brian K. Cole v. Wayne E. Ferrell, Jr.*, No. 2011-IA-01103-SCT, Mississippi Supreme Court, Dec. 6)

New Jersey

A court of appeals has ruled that a Department of Health draft report regarding a medical center's certificate-of-need application was covered by the deliberative process privilege. Frank Ciesla, attorney for Valley Hospital, a neighboring medical facility, asked for the draft report. When it was denied, he filed a complaint with the Government Records Council, which upheld the Department's privilege claim. Ciesla filed suit, arguing the GRC's decision was incorrect and that it had failed to consider the common law right of access to records. Observing that the record was still a draft, the court noted that "given their non-final character, it makes eminent sense to treat such pre-decisional drafts as protected materials within the umbrella of the deliberative process privilege." The court agreed with the Attorney General that the Open Public

Records Act created an unqualified exemption for deliberative materials. The court pointed out that "by carving out deliberative materials from the definition of a 'government record,' the Legislature manifestly did not invite the GRC or courts to dilute that exclusion by undertaking a balancing of the requester's asserted need against the privilege." Turning to Ciesla's common law access claim, the court agreed that the GRC's jurisdiction applied only to OPRA issues. The court indicated that "as a practical matter, it is institutionally sounder to have courts, rather than the GRC, evaluate the strengths and weaknesses of common-law arguments, in keeping with the functions that judges routinely perform in interpreting and applying the common law." The court concluded that "although Valley arguably has a keen interest in obtaining the staff report as a regulated competitor. . ., its desire to obtain that internal draft—which was never acted upon by [the Department]—does not outweigh the agency's strong interests in keeping its internal draft confidential." (*Frank R. Ciesla v. New Jersey Department of Health and Senior Services*, New Jersey Superior Court, Appellate Division, Dec. 4)

A court of appeals has ruled that Stephen Burke's open records request to the Office of the Governor for records concerning EZ Pass benefits for retirees of the Port Authority was sufficiently narrowly described that the Governor's Office should have conducted a more thorough search. The court noted that "because plaintiff described the records sought with the requisite specificity and narrowed the scope of the inquiry to a discrete and limited subject matter, we conclude his request was neither vague nor overbroad. The request sought the records themselves, not data, information or statistics to be extracted, gleaned or otherwise derived therefrom." The Governor's Office contended any records were privileged. But the court noted that the Governor's Office needed to provide more justification for its claims. "A mere assertion of privilege, as made in this case, simply does not suffice." (*Stephen E. Burke v. Raymond Brandes*, New Jersey Superior Court, Appellate Division, Dec. 7)

Wyoming

A trial court has ruled that the Department of Revenue has custody of a county-wide real property assessment data base and must disclose records to Roger Hurlbert. The Department argued that it did not have actual custody because information was put into the database by counties, not the Department. But the court found this was not controlling, noting instead that "the physical location of the server that houses the production assessment system does not control whether the Department has custody. The Court recognizes that the county is responsible for the server and must maintain the records on the production assessment system. This does not mean, however, that the Department does not also have custody. This circumstance frequently occurs. The Department has the ability to access and inspect the records through the use of its password at anytime." The court observed that "when an agency receives information necessary to comply with its statutory duties, that information is within its custody and control because the agency has the power to use the information for agency purposes." The court indicated that "the legislative intent of the [Wyoming Public Records Act] is clear; public records should be open to the public. A finding that only one agency should be required to disclose records would clearly defeat that intent." The court continued: "The Department argues that it would be an absurd result if it, or any agency, is a custodian 'merely because it has access to the database.' [T]he Department does not merely have access to [these] records, but uses them in furtherance of specific statutory duties. Further, the Court does not believe it is an absurd result to require the Department to disclose public records, when there is a strong public policy in favor of disclosure." (*Roger W. Hurlbert v. Wyoming Department of Revenue*, No. 178-526, Wyoming First Judicial District, Nov. 29)

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The Federal Courts…

Judge John Bates has ruled that videos of forced extraction of prisoners from their cells at Guantanamo are protected by **Exemption 1 (national security)**. Bates noted that "the [Defense] Department has identified particular harms and dangers to national security from disclosure of the information [the plaintiff] seeks. It claims that release of even solo images would allow such images to be manipulated and/or used as a propaganda tool and that release of the footage also raises the risk of its use as a vehicle for covert communication. Perhaps more hypothetical are the Department's arguments that military members would be placed at greater risk because release of the videos would encourage detainees to trigger more forced cell extractions in the chance that such encounters would be videotaped, and that the release of these videos would threaten foreign relations. Nevertheless, in sum, the Department has provided sufficient explanations as to how these solo images, if released, 'reasonably could be expected to result in damage to the national security' and are therefore properly withheld under exemption1." The International Counsel Bureau argued that the use of images in propaganda efforts was too hypothetical. But Bates observed that "context matters. The Department has provided plausible, non-conclusory reasons why even solo images of detainees taken from the forced extraction videos could pose a substantial risk and danger to national security. The Court finds no reason to second-guess such assertions, particularly when this Circuit has deemed it 'unwise' for courts 'to undertake searching judicial review' when it comes to assessments of harms to national security based on the agency's particular expertise." (*International Counsel Bureau and Pillsbury, Winthrop, Shaw, Pittman, LLP v. United States Department of Defense*, U.S. District Court for the District of Columbia, Dec. 4)

Judge Rosemary Collyer has ruled that the Education Department conducted an **adequate search** for internal communications from or between the agency and listed entities or individuals involved in the for-profit education sector and that CREW is not entitled to metadata included in the emails because it failed to ask the agency to provide such information. CREW asked for the records after news articles suggested undue influence on Education's regulations for the for-profit sector. Initially, the agency only searched the email accounts of agency employees named by CREW on an account-by-account basis. But beginning in February 2011, authorized agency personnel were able to conduct agency-wide email searches. Although the agency indicated on several occasions that its search was complete, it continued to find more records. CREW argued the agency's search was insufficient between it failed to recover emails and failed to expand its search. Collyer found the agency's search was clearly sufficient. She noted that one agency employee "had authorized access to the database that contains all emails received and sent since April 20, 2009, by all DoEd employees. . .and he searched that database using terms to which CREW had no substantive objection. Moreover, the electronic correspondence of all DoEd personnel, including the four persons specifically identified by CREW, was subject to two separate searches." CREW complained that the scope of the search of "paper, hard-copy files" was unclear. But Collyer noted that "the term speaks for itself. Moreover, DoEd has explained further: 'None of [the DoEd offices in question] maintain centralized repositories of records that would have been responsive to the FOIA Request. Rather, individuals in these offices maintain their own paper files, i.e., personal hard-copy paper files. . .Each of the paper, hard-copy files maintained by these individuals, whether in their offices or elsewhere, were searched manually for any correspondence [related to the FOIA request]. DoEd has more than met its burden of showing that its search was adequate under FOIA." CREW complained about differences in searches conducted by two different employees. Collyer observed that "there is nothing sinister in this inconsistency because [the two employees] *each* described two separate searches of *two separate systems*." CREW argued that the paper copies it received did not include metadata. Collyer responded by noting that "notwithstanding that it requested that DoEd *search* for records 'regardless of format, medium, or physical characteristics, and including electronic records and information,' CREW did not request DoEd *produce* its records in electronic format, much less electronic format with metadata." She

pointed out that "CREW invites the Court to find that a government agency must produce electronic records and/or metadata to comply with FOIA. The Court declines because it does not see here in CREW's argument any basis to *impose* an electronic copy obligation on a federal agency. The copying charge which FOIA imposes indicates that Congress anticipated that agencies would produce hard paper copies of all records requested, particularly when not otherwise requested and readily reproducible. CREW's argument that it is entitled to metadata and blind copy addresses of all emails, when that information cannot be readily produced by DoEd, fails as a matter of law." (*Citizens for Responsibility and Ethics in Washington v. U.S. Department of Education*, Civil Action No. 10-1712 (RMC), U.S. District Court for the District of Columbia, Nov. 26)

After reviewing the documents *in camera*, a federal magistrate judge in New York has ruled that the Treasury Department properly withheld many of the records under **Exemption 5 (privileges)**, but that some of them did not qualify for protection under the deliberative process privilege. The records focused on Treasury's restructuring of AIG's financial assistance plan as well as records pertaining to bonuses AIG paid to its executives. Magistrate Judge Frank Maas divided the records into several subject categories. One category involved a joint press release by Treasury and the Federal Reserve. Finding they were covered by the deliberative process privilege, Maas noted that "as the draft releases and related emails show, the Federal Reserve Board and Treasury initially crafted separate draft statements, which were shared and later combined into one statement. The unredacted documents also confirm that there were ongoing negotiations within each agency and between them concerning the content of the policy to be announced, whether the language accurately reflected that policy, and how the language itself might affect the contemplated transaction in the future. This kind of back-and-forth discussion to hammer out the details of contemplated transactions and refine the message to reflect the agency's developing position accurately is precisely what the deliberative process privilege is intended to protect." Maas found some emails concerning Secretary Timothy Geithner's awareness of the bonus payments issue were not protected. He pointed out that "Treasury has failed to point to any later substantive policy decision that was furthered by this discussion, which simply rehearses past events. Treasury also has redacted discussions of the timeline of when the agency became aware of the payments, including tentative dates that required confirmation. These tentative dates are not alternative substantive policy choices occupying space in the draft until a final decision is made. Rather, they are historical approximations that await confirmation. Such factual material is plainly outside the scope of the deliberative process privilege." Reviewing an email thread concerning a speech Geithner was to give, Maas observed that "the material is predominantly backward-looking and explains decisions that the agency previously had made. Second, the redacted text consists entirely of commentary on the messages and themes to include in the Secretary's speech. Accordingly, the document is concerned with packaging the agency's opinion for the public and must be released in full." (*Fox News Network, LLC v. United States Department of the Treasury*, Civil Action No. 09-3045 (FM), U.S. District Court for the Southern District of New York Nov. 26)

Judge Royce Lamberth has ruled that he does not have **personal jurisdiction** over the TVA and, as a result, the Sierra Club's FOIA suit against the agency must be transferred to the Middle District of Tennessee. The Sierra Club had filed several requests with the TVA concerning its plans for a coal plant in Tennessee. When the agency issued a draft Environmental Assessment on the plant, the Sierra Club filed suit in the District of Columbia asking for a preliminary injunction to force the agency to turn over requested documents. But Lamberth found he did not have jurisdiction over TVA. He noted that "the Sierra Club points to the word 'jurisdiction' [in FOIA] and concludes that this 'plain language' gives this Court personal jurisdiction over TVA. This is incorrect. Congress could have used the term 'jurisdiction' to refer to (a) subject matter jurisdiction; (b) personal jurisdiction and not subject matter jurisdiction; (c) both personal and subject matter

jurisdiction; or (d) neither personal nor subject matter jurisdiction in the technical legal sense of those terms. The Sierra Club has offered no textual or logical support for its conclusion that either one of the possible readings that include personal jurisdiction—(b) or (c)—is the best reading." He indicated that "other venue-conferring statutes have similarly been held not to confer personal jurisdiction." The Sierra Club argued that since Congress made government corporations like TVA subject to FOIA at the same time it changed the venue provisions in FOIA the two changes must have been intended to work together. Lamberth disagreed. "Simultaneous enactment, without more, does not imply that Congress intended the TVA to be subject to personal jurisdiction in D.C. . . .Given that there is 'nothing at all about service of process or personal jurisdiction' in the provision at issue here, it seems 'just as likely' that Congress enacted the two provisions at the same time without contemplating the thorny issue now presented." Lamberth noted that "neither the plain meaning nor the legislative history of the provision provide sufficient evidence that Congress intended to allow extraterritorial service of process. This Court will not do Congress' work for them." Lamberth then looked to the D.C. long-arm statute, which provides jurisdiction over claims that arise from transacting business in the District. But he observed that there existed an exception for businesses whose presence in Washington was solely concerned with dealing with government issues. The Sierra Club pointed out that TVA had a small office in D.C. that tracked government issues of concern to TVA. Lamberth indicated that "this office fits squarely into the government contacts exception, and prevents this Court from finding personal jurisdiction." Since the Sierra Club has asked Lamberth to transfer the case to the Middle District for Tennessee if he found he did not have personal jurisdiction, he agreed the transfer was a proper. (*Sierra Club v. Tennessee Valley Authority*, Civil Action No. 12-1852, U.S. District Court for the District of Columbia, Nov. 29)

Editor's Note: This is the last issue of *Access Reports* for 2012. The next issue, Volume 39, Number 1 will be published January 2, 2013.