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Washington Focus: A coalition of public interest groups has sent a letter to the House Committee on Oversight and Government Reform expressing strong opposition to the Research Works Act (H.R. 3699), which would effectively repeal NIH's Public Access Policy that provides no-fee access to NIH-funded medical research. The letter notes that "H.R. 3699 would affect access to scientific research underwritten by all other federal agencies. Access to critical information on energy, the environment, climate change, and hundreds of other areas that directly affect the lives and well-being of the public would be unfairly and unwisely limited by this proposed legislation." The letter ended by observing that "the NIH Public Access Policy has a proven track record of delivering positive benefits to the public, while holding the government accountable for public investment in scientific research; H.R. 3699 would lead to exactly the opposite effect."

Court Questions Agency Privilege Claims

Judge Colleen Kollar-Kotelly has raised concerns about many privilege claims made by the Department of Homeland Security pertaining to discussions at the Houston field office of Immigration and Customs Enforcement when it was forced to revise its response to a June 2010 memo from John Morton, Assistant Secretary of ICE, on national priorities for immigration enforcement. Making preliminary rulings on attorney-client communications, attorney work-product, and deliberative process, Kollar-Kotelly has provided a useful examination of elements of the privileges and what is or is not required in claiming them.

The June 2010 memo indicated that ICE should prioritize immigration cases where aliens posed a danger to national security, were recent illegal entrants, or were fugitives. The memo, however, explained that it should not be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. But an August 12 memo from Gary Goldman, Chief Counsel of the Office of Chief Counsel in the Houston ICE Office, indicated that cases that did not fit within the parameters of the national priorities

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memo should be dismissed as a matter of prosecutorial discretion. On August 20, Morton issued another national policy memo on how to deal with removal proceedings involving aliens with applications before U.S. Citizenship and Immigration Services. The memo outlined four elements to consider in potentially dismissing removal proceedings—the alien must be the subject of an application or petition for adjustment of status, the alien must appear to be eligible for relief, the alien must present a completed application to adjust status, and the alien must be eligible for adjustment of status. When he distributed the August 20 memo from Morton, Goldman withdrew his own memos, indicating that they were superseded by Morton's new memo. On August 25, ICE's Office of the Principal Legal Advisor sent a memo to Goldman concluding that his August 12 memo was not consistent with agency policy. Goldman responded that he had already rescinded the memo.

Judicial Watch requested records concerning review and possible dismissal of pending immigration cases in Houston. After Judicial Watch filed suit, DHS released 237 pages of spreadsheets, memoranda, and correspondence, releasing 46 pages in full and 191 pages in part. Judicial Watch challenged only the agency's reliance on Exemption 5 (privileges).

Kollar-Kotelly dealt first with the agency's attorney-client privilege claims. She noted that the party claiming the privilege had to show they were or attempted to become a client, the person to whom the communication was made was an attorney, the communication was confidential and made for the purpose of securing legal advice, and that the privilege was claimed by the client. Kollar-Kotelly found the agency's submissions "fail to provide *any* basis for this Court to find that the confidentiality of the communications at issue has been maintained. True, DHS's *Vaughn* Index and agency declaration recite other elements of the attorney-client privilege, but they do not speak of confidentiality in connection with the information withheld from Judicial Watch, even in conclusory terms. In the final analysis, FOIA places the burden on the agency to prove the applicability of a claimed privilege, and this Court is not free to assume that communications meet the confidentiality requirement." She also pointed out that "in identifying its justification for withholding information pursuant to the attorney-client privilege, DHS's *Vaughn* Index simply parrots selected elements of the attorney-client privilege." She observed that "DHS's generalized and non-specific showing fails to satisfy the Court that the attorney-client privilege has been properly invoked in connection with the information withheld from Judicial Watch."

However, DHS fared better when Kollar-Kotelly turned to its attorney work-product claims. Judicial Watch claimed spreadsheets were not protected by the privilege because the information was collected for the purposes of dismissing litigation, not in anticipation of litigation. Saying that the argument "lacks merit," Kollar-Kotelly indicated that "material may still be said to be prepared 'in anticipation of litigation' even when an attorney is deciding whether or not to pursue a case, including under circumstances analogous to those presented here." Judicial Watch also argued the agency had failed to show that information had not been shared with third parties. She rejected that argument as well, noting that "when it comes to the work product doctrine, disclosure to a third party constitutes a waiver when the disclosure is made under circumstances inconsistent with the maintenance of secrecy from one's adversary." Kollar-Kotelly pointed out that the agency mischaracterized Judicial Watch's argument to require a showing by the plaintiff that the information had somehow become public. Rather, Kollar-Kotelly noted, "Judicial Watch's argument is different. It is targeted to DHS's antecedent burden, as the proponent of the privilege, to establish the applicability of the work product doctrine." However, she added that "nevertheless, DHS's essential point is correct: the burden lies with Judicial Watch to establish that DHS has waived the protections of the work product doctrine. That is because, in contrast to the attorney-client privilege, the proponent of the work product doctrine does not bear the burden of proving non-waiver." She added that "despite the conjecture of its counsel, Judicial Watch does not adduce *any* competent evidence to support a finding that the specific information redacted from the spreadsheets was shared with third parties under circumstances inconsistent with the maintenance of secrecy."

But Kollar-Kotelly expressed concern with memoranda the agency claimed was exempt as work product, "DHS's *Vaughn* Index simply parrots elements of the work product doctrine when identifying its justification for withholding information. . .True, DHS's separate declaration provides a little more detail, separating the memoranda and communications into eight general categories, but DHS fails to correlate these categories to specific records identified in its *Vaughn* Index. Even if it had, the descriptions of some of these categories are so generic that, even when they are considered alongside DHS's partial production, they do not demonstrate that the information withheld can 'fairly be said to have been prepared or obtained because of the prospect of litigation.'"

Turning finally to the deliberative process claims, Kollar-Kotelly indicated that "DHS represents that the communications withheld under the deliberative process privilege are 'largely opinion,' but the agency concedes that 'they also contain some factual material selected by the authors which [is so] "inextricably intertwined" with deliberative material that its disclosure would compromise the confidentiality of deliberative information.' This empty invocation of the segregability standard, which DHS never couples with a more detailed representation relating to specific records, does not satisfy the Court that DHS has applied the correct standard." She added that "in light of these concerns about the adequacy of DHS's descriptions and its applications of the segregability standard, which at least theoretically could affect all of DHS's withholding decisions under the deliberative process privilege, the Court declines to rule on the merits of any of DHS's withholding decisions at this time. DHS shall first be afforded an opportunity to provide a more particularized evidentiary showing." (*Judicial Watch, Inc. v. United States Department of Homeland Security*, Civil Action No. 11-00604 (CKK), U.S. District Court for the District of Columbia, Jan. 27)

FOIA Release Confirms Informant's Status

Judge Amy Berman Jackson has ruled the FBI cannot use the (c)(2) exclusion to neither confirm nor deny that civil rights photographer Ernest Withers was a confidential informant because the agency already confirmed his status by releasing several documents to Memphis *Commercial Appeal* reporter Marc Perusquia as part of his FOIA request.

After Withers died in 2007, Perusquia requested his FBI files. He received 115 pages with some information exempted. He appealed the FBI's response to the Justice Department's Office of Information Policy and indicated that his request included Withers' FBI informant file. The FBI agreed to conduct another search and produced an additional 254 pages with redactions. After OIP upheld the FBI's action, the FBI disclosed another 373 pages. Perusquia then brought suit, alleging the agency had failed to release Withers' informant file and had not even acknowledged its existence. Jackson then held a hearing on whether or not the (c)(2) exclusion applied in this case. Although the FBI argued that Withers' status as an informant had not been confirmed by anything it disclosed, Perusquia pointed to one document that read: "Ernest Columbus Withers was formerly designated as ME 338-R [redacted text] captioned 'Ernest Columbus Withers; CI.'" Another document included the notation of "Conf. Info." The two documents, which had been released in response to Perusquia's FOIA request, were again publicly disclosed by the agency as part of its summary judgment motion filed in court. In court, the FBI contended the disclosure was inadvertent and did not constitute an official confirmation.

Jackson reviewed the legislative history of the 1986 Amendments that contained the exclusions, noting they were included to prevent agencies from having to implicitly disclose a confidential source by citing

Exemption 7(D) (confidential sources) as the reason for withholding identifying information. Instead, "the (c)(2) exclusion allows the government to inform the requester that it has no records responsive to the FOIA request without having to reveal whether or not there is a file or the named individual is actually an informant. By its own terms, the (c)(2) exclusion becomes inapplicable if and when an individual's status as an informant 'has been officially confirmed.'" Perusquia urged Jackson to restrict the exclusion's use to instances involving living individuals cooperating with narcotics or organized crime investigations where disclosing information could endanger the integrity of the investigation or the safety of an informant. He argued the exclusion did not apply here because Withers was dead and there was no ongoing criminal investigation into the civil rights movement. But Jackson rejected Perusquia's contention. She noted that "here, the (c)(2) exclusion as written does not contain any of the limitations that plaintiffs ask the Court to read into the statute. Rather, it applies 'whenever' informant records are requested in a certain manner." However, Jackson concluded that "the Court does not need to reach the question of whether the (c)(2) exclusion should be as limited as plaintiffs. . .suggest. Because even if the plain language of the exclusion is applied without the proposed narrowing, the exclusion would have no relevance 'if the informant's status as an informant has been officially confirmed.'"

Both sides pointed out that *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007), contained a standard for what constituted official acknowledgment for purposes of classified information, but Jackson noted that "there is a question as to whether that test should be applied here," and observed that a recent Ninth Circuit decision, *Pickard v. DOJ*, 653 F.3d 782 (9th Cir. 2011), specifically rejected the official acknowledgment standard as too restrictive in the context of an official confirmation of a confidential informant relationship. Jackson resolved the issue by pointing out that "a FOIA response is an 'official' communication by an agency made by personnel authorized to make such a disclosure." She added, here, "if the inclusion of the records in a FOIA response alone leaves some room to doubt the conclusiveness of the confirmation, the FBI disclosed the documents a second time in this case by attaching them as exhibits to its motion for summary judgment on the public docket. The filing provided even more detail than the first disclosure since notes were added to the original records explaining that the redactions from the document were made pursuant to Exemption 7(D), the category that applies to confidential source information." The FBI contended that the disclosed records "do not signify that Withers was a confidential informant." Jackson responded that "this argument is not worthy of serious consideration and it insults the common sense of anyone who reads the documents, especially now that the FBI has cited Exemption 7(D) as the justification for the partial redactions. The FBI also asserts that Withers' daughter has informed reporters that the documents do not convince *her* that her father served as an informant. The Court is not persuaded that an interested family member's perspective, however sincere it may be, sheds much light on the issue."

Nonetheless, the FBI continued to insist that no official confirmation had taken place and that it had a strict policy against ever confirming or denying the identities of confidential sources. Jackson indicated that "but the statute, which the FBI contends must be strictly construed, expressly contemplates that there will be circumstances where official confirmation has occurred. If the FBI is claiming that confirmation has not been provided by the FBI here because such confirmation is never provided, then it is taking the position that the exception expressly included in the statute is never going to be available." The FBI also claimed the disclosure was inadvertent and did not constitute an official confirmation. Perusquia argued that "inadvertent" was not the same thing as "unofficial." Jackson replied that "the FBI can point to no statutory language that calls for a showing of intent before confirmation can be 'official' or that requires a planned or purposeful revelation. Congress simply used the passive voice and provided that the exclusion would no longer be available if the informant's status 'has been officially confirmed.' And plaintiffs' point of view is consistent with the dictionary definition of the term: the word confirmation simply means that a fact has been established, not that it was formally or purposefully announced. Applying these definitions, the documents—which were 'officially' disclosed by the FBI—serve to corroborate, verify, and add new assurance to the validity of the assertion that Mr. Withers functioned as a confidential informant for the FBI."

Jackson pointed out that whether or not the disclosure was inadvertent, her ruling only required the agency to admit Withers' status as a confidential informant and did not reach the question of whether or not the records were protected by exemptions. But she noted that "more important, the claim of inadvertence being advanced here is a day late and a dollar short. It was first raised well after the disclosures, and it is entirely conclusory." Noting that Justice guidance indicated application of the exclusion should not be announced publicly, Jackson observed that "yet here, the FBI did no such thing. Instead, it responded to plaintiffs' motion for summary judgment with an opposition on the public docket expressly citing the (c)(2) exclusion. In other words, this is yet another example of official, public action by the FBI that tends to verify the informant's status and undermine the FBI's claim that merely complying with the FOIA regime and acknowledging the existence of the records or invoking Exemption 7(D) would cause some harm that the exemptions were designed to prevent."

Jackson reassured the FBI that her decision was not intended to establish a precedent for evaluating the use of exclusions. She pointed out that "the Court does not hold that the informant file must be produced—only that if the FBI has relied on the (c)(2) exclusion to treat the records as outside the scope of FOIA, that exclusion is no longer available in this case. So the FBI must review the file if it exists and then either produce the responsive documents or provide a Vaughn index identifying the specific exemptions under which any responsive documents have been withheld." (*Memphis Publishing Company, et al. v. Federal Bureau of Investigation*, Civil Action No. 10-1878 (ABJ), U.S. District Court for the District of Columbia, Jan. 31)

Views from the States…

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

Idaho

The supreme court has ruled that records of expenditures by John Bujak, who had contracted with the City of Nampa in Canyon County to provide prosecutorial services to the city, are non-exempt public records, but neither Bryan Taylor, Bujak's successor, nor the Canyon County Commissioners were obligated to disclose the records to Bob Henry because they did not create or maintain them. Henry requested accounting records related to Bujak's term as Canyon County prosecuting attorney, but the deputy prosecutor told Henry his office did not have Bujak's expense records because the money paid to him was sent to his private account. Henry filed suit. Bujak subsequently resigned and filed for bankruptcy. Taylor was appointed to serve the remainder of Bujak's term. As a result of the bankruptcy proceedings, the records were provided to Henry and he asked for attorney's fees as the prevailing party. The supreme court noted that because Bujak, as the prosecuting attorney, "has the authority to investigate or prosecute violations of state criminal statutes, ordinances, or regulations, the prosecutor would be an agency of the county." The court then observed that "although the contract provided that the payments due under the contract were to be paid to the county auditor, the country commissioner later agreed to permit the payments to be sent directly to Mr. Bujak. That did not convert the payments into his personal funds received in his capacity as a private individual for the performance of contractual obligations unrelated to the duties of the office of prosecuting attorney." The court explained that "that Mr. Bujak used a 'non-County account' into which to deposit monies received as the prosecuting attorney under the contract and from which to pay various office expenses and salary enhancements does not prevent the records of that account from being public records. He could not shield the records from examination by the public by using a private bank account rather than a county bank account."

Although Henry got the records from the bankruptcy proceedings, the supreme court indicated that neither Taylor nor the County Commissioners had any obligation to provide further records because they had not withheld anything. In denying Henry's request for attorney's fees, the court noted that "the office of the prosecuting attorney, as distinct from Mr. Bujak, has also never prepared, owned, used or retained the records. Only Mr. Bujak had access to the records, and there is no indication that they could have been located somewhere in the office of the prosecuting attorney after he resigned." (*Bob Henry v. Bryan F. Taylor*, No. 38016, Idaho Supreme Court, Jan. 5)

New Jersey

A court of appeals has ruled that the Paulsboro Police Department improperly redacted names and ages from Use of Force reports, but that it properly withheld a surveillance video of an incident outside the police department building which led both to an arrest and an internal affairs investigation. The court noted that there was no exemption in the Open Public Records Act requiring the withholding of names and ages. Instead, the court pointed out that "the Custodian has failed to meet her burden of proving that the denial of access to the information is authorized by law. . .There is no mandate in OPRA that such information be kept confidential." But the court found the surveillance tape was pertinent to a criminal investigation and was properly withheld under both OPRA and the common law right of access. The court indicated that "the video is pertinent to an active, open criminal investigation and an internal affairs investigation and its release would prematurely interfere with those ongoing investigations and as such should remain confidential." (*Terence Jones v. Paulsboro Police Department*, New Jersey Superior Court, Appellate Divisions, Jan. 12)

Ohio

The supreme court has ruled that the Cuyahoga Metropolitan Housing Authority must disclose records concerning lead toxicity in its housing units, but that personally identifying information may be redacted. The CMHA originally claimed that the request for the toxicity records by the law firm of O'Shea & Associates was for information rather than records and that the agency had no obligation to compile responsive information. The court of appeals found that the toxicity records were public records that must be disclosed with only social security numbers redacted. When the case reached the supreme court, the court noted that the agency could not claim that the request was impermissibly asked for compiled information rather than records. The court pointed out that "when initially responding to O'Shea's request for lead-poisoning records, CMHA did not suggest that it was ambiguous or overbroad, or an improper request for information rather than records; it did not make that argument until after O'Shea instituted its public-records mandamus case. And O'Shea itself had subsequently clarified its request, specifying that it requested records CMHA was 'required by federal law to keep of all instances of lead problem properties and repairs, as well as records of all instances where a child was poisoned.' . . .Therefore, we hold that O'Shea's request for lead-poisoning records was appropriate." But the court indicated that any personally identifiable information should be redacted from the lead-poisoning forms. The court observed that "we hold that the personal identifying information in CMHA lead-poisoning documents, such as the names of parents and guardians, their social-security and telephone numbers, their children's names and dates of birth, the names, addresses, and telephone numbers of other caregivers, and the names of and places of employment of occupants of the dwelling unit, including the questionnaire and authorization, do not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the CMHA and are not obtainable under the Public Records Act. However, the remainder of the completed forms is subject to disclosure. If any question should arise about whether any portion of the completed forms discloses personally identifiable information, the court of appeals on remand will determine which portions should be redacted and not be subject to disclosure." (*State ex rel. O'Shea & Associates Company, L.P.A. v. Cuyahoga Metropolitan Housing Authority*, No. 2010-1536, Ohio Supreme Court, Jan. 19)

Virginia

The federal Fourth Circuit Court of Appeals has ruled that the citizenship requirement in the Virginia Freedom of Information Act does not violate the Constitution's Privileges and Immunities Clause. Mark McBurney, a former Virginia resident who had moved to Rhode Island after he and his wife went through a divorce and custody battle, and Roger Hurlbert, a California data broker whose business relies on access to public land records in the states, filed suit challenging the VFOIA's citizenship restrictions. Although both plaintiffs had their requests turned down due to the citizenship restrictions, McBurney received most of the information he sought under a separate statute—the Virginia Government Data Collection and Dissemination Practices Act. The plaintiffs contended that the citizenship requirement in VFOIA violated the Privileges and Immunities Clause because it infringed on their right to equal access to information, equal access to courts, and the ability to pursue their economic interests on an equal footing. Hurlbert also alleged that the citizenship requirement infringed on his ability to pursue a common calling. Addressing the common calling claim first, the Fourth Circuit pointed out that "nothing in the language of the VFOIA prohibits Hurlbert from pursuing his profession in Virginia, or regulates his ability as a noncitizen to enter or engage in business there. Any effect on Hurlbert by the FOIA is by happenstance; a circumstance never recognized by the Supreme Court in its Privileges and Immunities Clause case law." The court noted that "the VFOIA simply does not regulate Hurlbert's ability to enter into or pursue his trade or profession in Virginia. At most, the VFOIA limits one method by which Hurlbert may carry out his business and thus has an 'incidental effect' on his common calling in Virginia. But the ease or method of carrying out one's work within a state is several steps removed from the right to work within the state on 'terms of substantial equality' as residents in the first instance." Turning to the other claims, the court explained that this case was distinguishable from *Lee v. Minner*, 458 F.3d 194 (3rd Cir. 2006), in which the Third Circuit struck down the citizenship requirement in Delaware's FOIA, because *Lee* dealt with access to information to be used to inform public debate and advocacy. The court indicated that "the Appellants want access to information of a *personal* import, rather than information to advance the interests of other citizens or the nation as a whole, or that is of political or economic importance. Thus, the 'right' the Third Circuit identified in *Lee*, and the basis for concluding it implicates the Privileges and Immunities Clause, does not apply to the case at bar." The court added that "access to a state's records simply does not 'bear upon the vitality of the Nation as a single entity,' such that VFOIA's citizens-only provision implicates the Privileges and Immunities Clause." (*Mark J. McBurney, and Roger W. Hurlbert v. Nathaniel L. Young*, No. 11-1099, U.S. Court of Appeals for the Fourth Circuit, Feb. 1)

The Federal Courts…

Judge Colleen Kollar-Kotelly has concluded her multiple rulings in a case brought by political activist Ralph Schoenman for records relating to himself, Lord Bertrand Russell, and six named organizations by finding that the CIA properly withheld records from Schoenman under **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Kollar-Kotelly found the agency had provided ample explanations for why disclosure of the records could harm national security. Although Schoenman disagreed, she noted that "the Court has conducted a searching review of the [agency's] declarations, the CIA's *Vaughn* index, and the partial production to Schoenman, and is satisfied that it is both plausible and logical that the disclosure of the information withheld 'reasonably could be expected to result in damage to the national security.'" She explained that "the Court appreciates that Schoenman has his own opinion as to the magnitude of the national security interests implicated by the information captured by his FOIA requests, but he once again fails to recognize that '[t]he applicable legal standard. . .is clear and "allocates to the government the responsibility for evaluating the harms associated with public disclosure, and neither the proponent of disclosure nor the district

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court is free to substitute it own policy judgments for those of the Executive.””" Turning to the Exemption 3 claims, Kollar-Kotelly pointed out that the agency's declaration and index "provide a sufficiently detailed explanation as to why the information withheld from Schoenman falls within the universe of information protected from public disclosure by the National Security Act and the Central Intelligence Agency Act. Taking into account the 'special deference owed to agency affidavits on national security matters,' the Court is satisfied that the CIA has met its burden of establishing the applicability of Exemption 3 to the withheld information. Schoenman's arguments to the contrary. . .simply do not counsel in favor of a different result." (*Ralph Schoenman v. Federal Bureau of Investigation, et al.*, Civil Action No. 04-02202 (CKK), U.S. District Court for the District of Columbia, Jan. 23)

A federal court in California has ruled that Customs and Border Protection properly claimed regulatory exemptions put in place in 2010 to withhold information from Edward Hasbrouck that he requested in 2007 and 2009 under the **Privacy Act**. The agency contended that *Southwest Center for Biological Diversity v. Dept of Agriculture*, 314 F.3d 1060 (9th Cir. 2002), in which the Ninth Circuit ruled that the Agriculture Department could claim an Exemption 3 statute applied even though it had been passed by Congress after the organization had made its FOIA request because the law should be interpreted at the time the court decided the case, allowed CBP to withhold the information. Hasbrouck argued that the Privacy Act served different purposes than FOIA and that he had a vested interest in being able to see the information he had provided previously. Saying that Hasbrouck's arguments "prove too much," the court noted that "Hasbrouck has not argued, and could not reasonably do so, that exemptions promulgated in 2010 would not apply to any request he might make today. Yet the same previously-collected information would fall within the scope of the exemption and could properly be withheld from any materials produced in response to a new request. This highlights the observation in *Biological Diversity* that 'retroactivity' simply is not implicated, because plaintiff's claim in essence seeks prospective injunctive relief—an order requiring CBP to turn over information now. As such, this is one of the many circumstances in which 'a court should apply the law in effect at the time it renders its decision,' notwithstanding the happenstance that Hasbrouck made his Privacy Act requests before the current exemptions were promulgated." Hasbrouck also claimed he had a right under FOIA and the Privacy Act to a list of personal or unique identifiers by which data could be retrieved from various databases. Although the agency had publicly disclosed that records could be searched by name or address, it had not listed any other types of personal identifiers that could be used and denied the information under **Exemption 7(E) (investigative methods and techniques)**. Ruling in favor of the agency, the court pointed out that "while it may be of little consequence to law enforcement efforts to disclose that CBP can retrieve information based on obvious identifiers such as birthdates, passport numbers, or similar data, it manifestly would implicate security concerns to disclose that CBP also tracks one or more non-obvious identifiers, or for it to admit that it cannot retrieve information except by obvious identifiers. Accordingly, CBP need not provide the list of identifiers Hasbrouck is seeking." The court also ordered the agency to search its records based on variants of the spelling of Hasbrouck's name. The court indicated that "while it may be true that Hasbrouck would be unlikely to misspell his own name, it is plausible that it would not always be entered into data sources correctly." (*Edward Hasbrouck v. U.S. Customs and Border Protection*, Civil Action No. 10-3793 RS, U.S. District Court for the Northern District of California, Jan. 23)

Judge James Boasberg has ruled that the Postal Service conducted an **adequate search** when it told Steven Martinez that it could not find employment records for former contract employee Guillermo Gonzalez, although they might exist at the National Records Center. Martinez originally requested Gonzalez's records and was told he would need to provide Gonzalez's authorization. Martinez filed suit, but not until then did he mention that he had been convicted of murdering Gonzalez. Nevertheless, the agency still could find no records on Gonzalez. Dismissing the case, Boasberg noted that "plaintiff here may be dissatisfied with

USPS's search, but he does not produce evidence to undermine its adequacy. . .USPS submitted [a] declaration which' averred that a search was conducted of 'the applicable USPS database [that] contains employment records such as those requested by Plaintiff.' Using the Social Security number and date of birth for Gonzalez that were provided by Plaintiff, [the agency] was unable to locate any personnel file or record of employment for Gonzalez." Pointing out that the agency had indicated records of former employees were retained at the NRC, Boasberg observed that "this provides another explanation for why records of Gonzalez would not be in USPS custody. Plaintiff, of course, is free to submit a request to the NRC in hopes of achieving better success." (*Steven Martinez v. United States Postal Service*, Civil Action No. 11-1105 (JEB), U.S. District Court for the District of Columbia, Jan. 17)

Judge James Boasberg has ruled that Percy Jeter has failed to show that information in his pre-sentence report about a prior conviction was inaccurate and required correction under the **Privacy Act**. When Jeter pointed this out after a parole hearing, the Bureau of Prisons queried the D.C. Court Services and Offender Supervision Agency, which reviewed the records and determined the material was in fact accurate. Jeter then filed suit. Boasberg noted that Jeter had brought suit after the Privacy Act's two-year statute of limitations had expired. He pointed out that "in this case, Plaintiff would have had an opportunity to review his PSR, which contained the allegedly erroneous information, before both his 2002 and 2006 parole hearings. Nor would the doctrine of equitable tolling apply since that doctrine 'applies most commonly when the plaintiff "despite all due diligence. . .is unable to obtain vital information bearing on the existence of his claim."'" As Plaintiff did not lack access to the vital information—indeed, he twice had the opportunity to review it previously—his claims are time-barred." Boasberg then explained that "even were the statute of limitations not a bar, Plaintiff's claim against BOP would fail because the PSR maintained by BOP is exempt from the provisions of the Privacy Act. Under the terms of the Act, the head of an agency may exempt any system of records if 'maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal law, including. . .parole authorities, and which consists of. . .reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws. . . through release from supervision.' Pursuant to this authority, BOP has exempted certain records systems from the Privacy Act, including the Inmate Central Record System that maintains the Plaintiff's PSR. Because this record system is exempt from the Privacy Act, BOP need not correct Plaintiff's PSR." Boasberg then noted that, although BOP was shielded because of its exempt system of records, the U.S. Parole Commission was not. But he observed that "that matters not at all here because, even absent the procedural bars, Plaintiff can obtain no relief because he misinterprets the records [he is seeking to correct]. In other words, there is no inaccuracy in his PSR to be corrected. CSOSA's review of the Superior Court records revealed that the PSR correctly counted the conviction for Assault with a Dangerous Weapon (Case No. 5513-78), which Plaintiff claims had been dismissed. CSOSA determined, instead, that Plaintiff's Auto Tampering charge (Case No. 4308-78) had been dismissed. The Court's independent review, no doubt assisted by many years of reading Superior Court [case] jackets, confirms CSOSA's determination." (*Percy L. Jeter v. Federal Bureau of Prisons*, Civil Action No. 11-996 (JEB), U.S. District Court for the District of Columbia, Jan. 27)

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.

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email: _____________________
Zip Code: __________________