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Washington Focus: This year's Sunshine Week activities will begin with a Mar. 12 event at the Justice Department featuring Attorney General Eric Holder. The program will highlight achievements of various agencies in applying the goals of Holder's FOIA memo issued in 2009. The event is open to both agency personnel and the public. To register, please contact Bertina Adams Cleveland at DOJ.OIP.FOIA@usdoj.gov . . .On Mar. 16, American University Law School's Collaboration on Government Secrecy will hold a day-long conference on FOIA. Also that day, the First Amendment Center will host a morning conference at the Newseum, followed by an afternoon series of panels hosted by OpenTheGovernment.org. To register for both or either conference, contact Ashlie Hampton at ahampton@freedomforum.org, or by phone at (202) 292-6288.

Tenth Circuit Rules Mug Shots Protected

After the Supreme Court put most personal information off limits in its 1989 *Reporters Committee* decision, appellate courts in particular began to find any number of reasons why such information was protected by Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). An occasional district court judge would signal his or her distaste for the rigidity of the *Reporters Committee* standard and stray off the reservation to find that disclosure of a certain category of personal information did indeed serve the public interest. But those cases were largely the exception. But in 1996 the Sixth Circuit ruled in *Detroit Free Press v. Dept of Justice*, 73 F.3d 93 (6th Cir. 1996), that mug shots of those individuals arrested on federal charges were not protected by the privacy exemptions and, as a matter of fact, there was no cognizable privacy interest in one's mug shot. To those in the access community, the case seemed like a well-deserved breath of fresh air, although one whose effect the Justice Department set about minimizing to the greatest extent possible. Although the *Detroit Free Press* ruling remained the only appellate case for years, a 1999 district court decision – *Times Picayune v. Dept of Justice*, 37 F. Supp. 2d 472 (E.D. La 1999) – has become much more frequently cited because it went the other way, finding a protectable privacy interest in mug shots. The Eleventh Circuit finally found mug shots were

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protected in *Karantsalis v. Dept of Justice,* 635 F.3d 497(11th Cir. 2011) and now another nail has been driven in the coffin of public access to mug shots by the Tenth Circuit's ruling against the *Tulsa World*, upholding a district court decision. But while the Tenth Circuit gives a ringing endorsement of the non-disclosure of mug shots, the case says virtually nothing about what is private about mug shots but spends most of its time observing that the *Tulsa World* was unable to provide a convincing argument for why disclosure of mug shots was in the public interest.

Tulsa World argued that the Justice Department's contention that mug shots were not generally available was belied by the practice in most states and in the Sixth Circuit, where the Marshals Service adheres to a practice of disclosing mug shots from any jurisdiction as long as they are requested by someone who has access to the Sixth Circuit. But the Tenth Circuit indicated that "we are not persuaded by the practice of other jurisdictions." The court continued: "To the contrary, the actions of state law enforcement agencies in disclosing booking photos does not mean that *USMS booking photos* are generally available to the public outside of the Sixth Circuit. Persons arrested on federal charges outside the Sixth Circuit maintain some expectation of privacy in their booking photos."

Although the government traditionally takes the position that disclosure of information to an elementary school student in Paducah would require disclosure of the same information if requested by the most notorious international terrorist, the abundant public availability of mug shots apparently had no effect whatsoever on the Tenth Circuit. The court noted that "except in limited circumstances, such as the attempt to capture a fugitive, a USMS booking photograph simply is not available to the public. Apparently disseminating "fugitive" mug shots in post offices across the country does little to diminish the privacy expectation in mug shots generally. The Tenth Circuit rejected the World's claim that the explosion of personal cell phone cameras made it much more likely that people would be photographed in public places by finding that public availability "cuts against [the World's] position. Given easy access to photographs and photography, surely there is little difficulty in finding another publishable photograph of a subject."

Without explaining what the privacy interest actually is, the court then went on the say why there is no public interest in disclosure. The *Tulsa World* identified nine possible public interests that could be furthered by disclosure. These included: (1) determining the arrest of the correct detainee, (2) detecting favorable or unfavorable or abusive treatment, (3) detecting fair versus disparate treatment, (4) racial, sexual, or ethnic profiling in arrests, (5) outward appearance of detainee, (6) comparison in detainee's appearance at arrest and at time of trial, (7) allowing witnesses to come forward and assist in other arrests and solving crimes, (8) capturing a fugitive, and (9) showing whether the indictee took the charges seriously. The court noted that "based on the purpose of the FOIA, there is little to suggest that disclosing booking photos would inform citizens of a government agency's adequate performance of its function." The court added that "while it is true that Interests 2-6 are legitimate public interests under the FOIA, there is little to suggest that releasing booking photos would significantly assist the public in detecting or deterring any underlying government misconduct."

However, what is remarkable about the Tenth Circuit's citations to other mug shot cases is just how refreshingly logical the quotations from the *Detroit Free Press* decision remain 15 years later. The Sixth Circuit noted that "the personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information in the possession of government agencies." What resonates from the *Detroit Free Press* decision and is missing from the other decisions going the other way and protecting mug shots is the recognition that finding oneself in an unfortunate situation that results in a public arrest, indictment, and subsequent court proceedings does not entitle an individual to expect that their public brush with the law should be swept under the rug because it embarrasses them and makes them feel uncomfortable. Do we want to move towards a legal system where the existence of many criminal proceedings is kept secret because they embarrass the individuals accused and/or convicted? Such results are

only several steps removed from a government policy that protects a graphic illustration of an individual's intersection with the law. (*World Publishing Company v. United States Department of Justice*, No. 11-5063, U.S. Court of Appeals for the Tenth Circuit, Feb. 22)

Views from the States…

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

Arizona

An appeals court has ruled that a PowerPoint presentation prepared by the Phoenix Police Department for discussions with the City Manager may be protected by the attorney-client privilege, but there is still a question as to whether the City maintained the confidentiality of the PowerPoint presentation, particularly in light of the Phoenix Law Enforcement Association's claim that the Assistant City Manager discussed the presentation in detail with a PLEA representative. The City first contended that the presentation was not a public record because it did not result in any government action. But the court noted that "the very creation of the PowerPoint was government activity, as was the presentation of the PowerPoint to City officials and attorneys. Thus, we reject the City's argument that the PowerPoint is not a public record because it did not document or result in official activity." PLEA argued that because the exception for the attorney-client privilege indicated that an attorney could not be forced to answer questions about such discussions during discovery, the privilege did not apply when records were obtained from the client. The court rejected that claim, noting that the common-law privilege, while covering both the attorney and the client, included even more robust protection for the client. The court then rejected PLEA's contention that facts were not protected, pointing out that "the attorney-client privilege allows the client to refuse to disclose what facts he discussed with his attorney" and added that "if the PowerPoint is a privileged communication, it is not subject to inspection under the public records law even if it contains nothing more than facts." But the court agreed the City had so far failed to show that it maintained the confidentiality of the PowerPoint. The court observed that 'it is undisputed that [the Assistant City Manager] disclosed the existence of the PowerPoint and PLEA contends he described its contents in detail. This disclosure appears to be inconsistent with the intent to treat the PowerPoint as a confidential communication." The court sent the case back to the trial court to determine if the City had waived the confidentiality of the PowerPoint presentation. (*Phoenix Law Enforcement Association v. City of Phoenix*, No. 1 CA-CV 10-0862, Arizona Court of Appeals, Division 1, Department E, Feb. 14)

Arkansas

The supreme court has ruled that routine use-of-force reports required to be prepared by any Little Rock police officer involved in a use-of-force incident are not protected by the employee evaluation or job performance exception. The court noted that "use-of-force reports routinely prepared in accordance with [Little Rock police department policy] are not employee-evaluation or job-performance records. These reports are created by the police officer, not by a supervisor, and are a routine narrative account of the officer's actions during a specific incident. Furthermore, these reports are not an assessment or evaluation of the police officer's performance, because they are created by the police officer himself or herself, and self evaluation is not what is contemplated by [the pertinent Little Rock police department order]. The fact that these reports are sometimes used by supervisors later on to evaluate a police officer's performance and in preparing their own

incident reports does not transform the initial reports into evaluations or job-performance records." (*Stuart Thomas v. Keith Hall*, No. 11-1199, Arkansas Supreme Court, Feb. 16)

California

A court of appeals has rejected a preliminary injunction requested by the Long Beach Police Officers Association and ruled that the Long Beach Police Department must disclose the names of police officers involved in shootings during the past five years. Both the Association and the Police Department argued that exemptions for internal investigations, personnel records, and personal privacy protected the records. The trial court found none of the exemptions applied, but allowed the Association to appeal its decision. The appellate court agreed, noting that "appellants cannot transform an officer's identity into confidential information by asserting that the officer's involvement in a shooting has resulted in an appraisal or discipline. The Supreme Court has repeatedly stated that the protection afforded by the [exemption] does not extend to information that may be contained in the same file as information expressly protected by the statute." The court added that "where an officer's name is neither derived from nor results in the disclosure of information about 'employee advancement, appraisal, or discipline,' it is not protected from disclosure." The appellate court affirmed the trial court's rejection of claims that disclosure could potentially harm officers. The court observed that "appellants' assertion of possible threats was inadequate under the [privacy] exemption, absent any evidence indicating that the safety or effectiveness of any particular officer was threatened by the disclosure of his or her name." (*Long Beach Police Officers Association v. City of Long Beach*, No. B231245, California Court of Appeal, Second District, Division 2, Feb. 7)

Connecticut

The supreme court has ruled that the University of Connecticut properly withheld databases pertaining to football season ticketholders, subscribers to programs at Jorgensen Auditorium, persons interested in programs at the Center for Continuing Studies, and donors and friends of the library because they constituted trade secrets. The FOI Commission originally found none of the databases qualified as trade secrets because the University was not engaged in trade. That decision was rejected by the trial court, which found the databases constituted customer lists and that the business information exemption in FOIA did not require an entity to be engaged in trade in order to claim that records were trade secrets. The supreme court pointed out that the statutory definition of trade secrets "focuses exclusively on the nature and accessibility of the information, not on the status or characteristics of the entity creating or maintaining that information. More particularly, there is no requirement, express or implied, that the entity generally must be engaged in a 'trade,' however one might define that term. In the absence of any such limitation, it is self-evident that there cannot be any basis to apply that limitation to public, but not private, entities. If the information meets the statutory criteria, it is a trade secret and the entity creating that information would be engaged in a trade for purpose of the act even if it was not so engaged for all purposes." Explaining the rationale for extending trade secret protection to state universities, the court observed that "the state's ability to recoup costs or reap the financial benefits for [research and development at state universities] would be seriously undermined if any member of the public could obtain such information simply by filing a request under the act." (*University of Connecticut v. Freedom of Information Commission*, No. 18772, Connecticut Supreme Court, Feb. 21)

A trial court has ruled that the FOI Commission properly concluded that the Freedom of Information Act did not require the Town of Bridgewater to maintain an online banking relationship so that cancelled checks for town accounts could be accessed electronically. Paul Garlasco asked the Town for copies of checks written on the Burnham Fund account. Although the Town was able to get copies of the checks from its broker, Garlasco complained that the Town was required to have an online account for easier access. After the Commission found that electronic versions of the checks were not public records because they were not

maintained by the Town in that format, Garlasco filed suit. Garlasco argued that a provision in the FOIA allowing requesters to obtain electronic records applied. The court disagreed, noting that "the language of subsection (b) clearly applies only to records existing in the public agency's computer system. The uncontroverted testimony at the hearing was that the town does not maintain the requested cancelled checks in its computer system, nor did it ever have online access to the cancelled checks via an online banking relationship with its financial institution. There is no evidence in the record regarding the town having acquired a computer system, equipment or software, and nothing requires a town to acquire a computer system, equipment or software, or to establish an online banking relationship with its broker." (*Paul. J. Garlasco v. Freedom of Information Commission*, No. HHB-CV-11-6009271S, Connecticut Superior Court, Judicial District of New Britain, Feb. 2)

Georgia

The supreme court has ruled that public bodies are required to record the votes of members in a non-roll call vote. The case stemmed from a suit challenging the minutes of an Atlanta City Council retreat in which a bare majority of members voted to retain existing rules on public comment at council meetings. In the minutes, the council indicated only that a majority of the council voted against the proposal. Matthew Cardinale filed suit after the council refused to amend its meet minutes to show the votes of members. Because the provision in the Open Meetings Act explicitly required public bodies to record roll-call votes but seemed to leave the recordation of non-roll call votes to the discretion of the public body, the appeals court ruled the statute did not require recordation of non-roll call votes. But the supreme court disagreed. The court noted that "the correct reading [of the voting provision], and the one that is most natural and reasonable, is that, having first mandated that meeting minutes include a 'record of all votes,' the subsection then sets forth alternative requirements for accurately recording individuals' votes in the case of both roll-call and non-roll-call votes. In the case of a non roll-call vote, the minutes must list the names of those voting against a proposal or abstaining. If no such names are listed, the public may correctly presume that the vote was unanimous. If such names are listed, a member of the public need only look at the list of voting officials in attendance at the meeting to determine who voted for a proposal." The court added that "to adopt a contrary holding that agencies possess discretion to decline to record the names of those voting against a proposal or abstaining in the case of a non-roll-call vote would potentially deny non-attending members of the public access to information available to those who attended a meeting. Such a result conflicts with the Act's goal of greater governmental transparency. Further, under appellees' proposed construction [the voting provision] requires a presumption that a non-roll-call vote is unanimous even when it is not if the agency elects not to record the names of those voting against a proposal or abstaining. Construing the statute to mandate a presumption contrary to fact would produce unreasonable results. We cannot conclude that the General Assembly intended to require members of the public to presume, incorrectly, that a non-unanimous, non-roll-call vote was, in fact, unanimous or intended that a presumption govern even if some members of the public know from attending the meeting or otherwise that the vote was split." (*Matthew Cardinale, v. City of Atlanta*, No. S11G1047, Georgia Supreme Court, Feb. 6)

Michigan

A court of appeals has ruled that the Troy Police Department acted arbitrarily and capriciously when it denied Frank Lawrence's requests for information about policies for issuing traffic citations and any information about police officers who had been sued because his request related to his challenge to a traffic ticket. On its second review of the case, the appeals court rejected the trial court's conclusion that records pertaining to whether or not Troy police had a quota system for issuing tickets were exempt. Instead, the appeals court noted that "we fail to understand how disclosing whether police officers are subject to a quota

would impair the department's attempt to enforce traffic laws." While the court agreed that information about internal investigations could be withheld, information about civil suits against officers could not be withheld, and pointed out that "the public interest in disclosure of records *unrelated to internal departmental discipline* outweighs the public interest in nondisclosure." (*Frank Lawrence, Jr. v. City of Troy*, No. 300478, Michigan Court of Appeals, Feb. 14)

New Jersey

A court of appeals has ruled that Union County must disclose a list of self-identified senior citizens who signed up to receive a newsletter from the County. The County disclosed the list of names but redacted home addresses to protect individual privacy. The trial court ruled the list should be disclosed and the County appealed. While the appellate court agreed the list should be disclosed, it expressed concern that individuals who signed up for the list were not told that it could potentially be disclosed. The court rejected the claim that "senior citizens" was a discrete enough identifier to potentially constitute an invasion of privacy, noting that "our concern is that the term 'senior citizen' is too broad a label to fall within the purview of a meaningful identifier. It is without definition or parameters. We are not convinced that the designation 'senior citizen' is any more of a personal identifier than the label 'homeowner' [rejected as too broad in a previous case]. We do not minimize the concerns defendant expressed about senior citizens and the potential for crime or fraud, but there is a similar concern about the personal identifier 'homeowner' and the potential for mischief when addresses of homeowners are disseminated." The court concluded that "in holding that the addresses were improperly redacted and should be made available, we do note that some of defendant's concerns could be abated by attaching a legend ort notice to any solicitation of those willing to receive the newsletter that names and addresses are subject to [the Open Public Records Act] and may be disclosed upon request. We recognize that this may inhibit potential newsletter recipients' willingness to avail themselves of the service; nevertheless, such notice affords the recipients full knowledge of the potential dissemination of one's name and address to third parties." (*Tina Renna v. County of Union*, No. A-1811-10T3, New Jersey Superior Court, Appellate Division, Feb. 17)

The Federal Courts…

Judge Colleen Kollar-Kotelly has ruled that the FCC properly withheld revenue information from forms filed by telecommunications carriers with the Universal Service Administrative Company, which administers the Universal Service Fund to help provide communities with affordable telecommunications services and is overseen by the FCC. Skybridge Spectrum Foundation, a non-profit telecommunications company headquartered in Berkeley, requested the forms for several competitors. The FCC ultimately provided much of the information included on the forms, but withheld the revenue information. Skybridge appealed by arguing that the information was not covered by **Exemption 4 (confidential business information)** because it was largely fraudulent and, thus, its disclosure could not constitute competitive harm. Skybridge filed suit after it was dissatisfied with the agency's decision on its administrative appeal. The agency initially contended that Skybridge had not **exhausted its administrative remedies** because it had argued nothing more than that the information was fraudulent. Indicating that "the record does not support such a parsimonious construction of Skybridge's written requests for administrative review," Kollar-Kotelly explained that "Skybridge undeniably argued that the information withheld in this case did not meet the legal definition of confidential commercial information, as that definition had been developed by the federal courts." Kollar-Kotelly then noted that Skybridge admitted the agency had already disclosed most of the information it sought. Nevertheless, since Skybridge contended that Exemption 4 did not apply, she went on to analyze the agency's claim. She pointed out that "the FCC has made a sufficient showing that the public

disclosure of this information would, either on its own or in conjunction with other publicly available information, (1) provide competitors with specific information about [Skybridge's] competitors' competitive lines of business, general market segmentation and positioning, and competitive strength, (2) reveal confidential account numbers, and (3) disclose service pricing and customer identities that could be used by competitors to contact customers and undercut pricing." She rejected Skybridge's claim that the information was fraudulent, noting that "not only is Skybridge's interpretation legally unsupported, it would also be completely unworkable because it would effectively require agencies, and later the courts, to test the truth and accuracy of each discrete item of information covered by a plaintiff's request before applying the protections afforded by Exemption 4." (*Skybridge Spectrum Foundation v. Federal Communications Commission*, Civil Action No. 10-01496 (CKK), U.S. District Court for the District of Columbia, Feb. 2)

Judge Royce Lamberth has castigated the International Boundary and Water Commission for its failure to conduct even the semblance of an **adequate search** for two simple FOIA requests submitted by Public Employees for Environmental Responsibility. After Commission General Counsel Robert McCarthy was removed from his job in July 2009, he appealed the Commission's decision to the Merit Systems Protection Board. To represent it before the Board, the Commission hired the law firm of Jackson Lewis. PEER became concerned that this was a potential misuse of government funds and filed a request for the retainer agreement and for records showing the source of funding. The agency withheld the agreement on the basis of attorney-client privilege and referred PEER to its website for information about its congressional funding. After reviewing the retainer agreement *in camera*, Judge Emmet Sullivan upheld the agency's redactions. However, he found the agency had not supported its search and asked for further explanation. The case was then reassigned to Lamberth, who pointed out that "the agency only responded to a *question* that PEER did not ask—that is, 'Where did the funds come from that were used to pay Jackson Lewis?' PEER didn't ask the agency, that, or any other question. Rather, PEER made a routine FOIA records request calling for 'all documents that evidence the source of the funds used to pay for representation by Jackson Lewis in the matter concerning McCarthy v. USIBWC.' The Commission's obligation, under FOIA, was not to construe PEER's request narrowly as a call for the agency's opinion on a question and to produce *some* records supporting that unsolicited opinion; the agency's obligation was to begin a search for 'all' the documents it had on the topic, and to set the stage for a reasonable search by identifying the agency components and personnel that might have responsive records. . .By impermissibly interpreting PEER's records request so narrowly, the Commission could not have conducted an adequate search." Finding that the agency continued to show signs of intransigency, Lamberth told the Commission to search six other offices and "at a minimum, explain in *detail* in nonconclusory affidavits why a search of those offices would not produce records responsive to PEER's FOIA request. . .[T]he Court will order the Commission to submit to PEER and file with this Court, alongside any responsive documents, a detailed *Vaughn* index describing documents redacted or withheld and the Commission's grounds for doing so." (*Public Employees for Environmental Responsibility v. United States International Boundary and Water Commission*, Civil Action No. 10-19 (RCL), U.S. District Court for the District of Columbia, Feb. 7)

A federal court in Wisconsin has ruled that the government waived any protection under **Exemption 5 (privileges)** for various documents when they were shared by Justice Department attorneys representing agencies with different interests. The case involved a request by Menasha Corporation dealing with liability for a Superfund clean-up. While the EPA was involved in prosecuting the case, the Army Corps of Engineers was another potentially liable party and its interest in the litigation was to minimize its liability. Admitting the documents were privileged on their face, Menasha argued that the DOJ attorneys representing both the EPA and the Corps of Engineers had shared the documents among themselves. The court noted that "the EPA may

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seek joint and several liability against any [responsible party] and should seek to impose the maximum liability appropriate against any [responsible party]. USACE's self-interest, however, is to minimize its liability. The interests of the EPA and UACE are thus adverse. Attorneys who represent parties with adverse interests waive attorney-client and work product privileges as to documents they willingly share with their adversaries." The agencies argued they represented one client—the United States. But the court observed that "the interests here are clearly adverse; there is no difficulty in discerning the specifically competing interests. The Environmental Enforcement Section is responsible for coordinating enforcement efforts whereas the Environmental Defense Section is responsible for coordinating defense litigation strategies. Because the United States has competing interests in this case, it (appropriately) has separate counsel from EES and EDS independently representing the interests of their respective client agencies in the same manner as other adverse parties. Communications between those adverse parties therefore waive the privilege, as would communications between Plaintiff Menasha and any other [responsible party]." (*Menasha Corporation v. United States Department of Justice*, Civil Action No. 11-C-682, U.S. District Court for the Eastern District of Wisconsin, Jan. 26)

Price Increase

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

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