Volume 38, Number 5
February 29, 2012

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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

ISSN 0364-7625.

Washington Focus: After the National Security Archive awarded its 2011 Rosemary Award to the Justice Department for several instances in which the agency appeared to place government secrecy over the Obama administration's much lauded pro-disclosure policies, including telling the Supreme Court that it did not believe FOIA exemptions should be narrowly construed, TRAC has published a report finding that legal positions taken by DOJ in defending FOIA suits have hindered FOIA openness. Although DOJ promised to provide the access community with evidence of how its pro-disclosure litigation policies were working in practice, the TRAC report found that "available evidence indicated that no affirmative steps needed to implement the new defensive standards were ever taken. Further, there is little evidence that these new standards have made any impact on actual Department of Justice practices in defending federal agency withholding. In short, the new defensive standards seem to have become simply empty words on paper."

Courts Orders Agency to Disclose Classified Document

In a case that has dragged on for more than ten years, Judge Richard Roberts has taken the unprecedented move of ordering the U.S. Trade Representative to disclose a document classified as confidential after finding the agency's arguments for continued classification made no sense and, thus, were not supported by the Executive Order on classification. Roberts noted that "having been afforded three opportunities to justify withholding the document, USTR has not provided a plausible or logical explanation for why disclosure of the document would harm the United States' foreign relations. Accordingly, USTR's motion for summary judgment will be denied, [the Center for International Environmental Law's] cross-motion will be granted, and USTR will be ordered to disclose Document 1."

Although many people in and outside government believe too much information is classified, courts have been extraordinarily reluctant to "second-guess" an agency's procedurally proper decision to classify information. In response to the Supreme Court's conclusion in *EPA v. Mink*,

410 U.S. 73 (1973) that once a document was properly classified courts had no authority to question that decision, Congress very specifically told courts to analyze classification decisions under the same de novo standard applicable to other exemption claims. But to head off a threatened veto of the 1974 FOIA amendments by President Gerald Ford, Congress added language in the legislative history indicating that agency classification determinations should be accorded deference by the courts. In an era of judicial interpretation that has been dominated by plain language analysis – the judicial doctrine that if a statue is clear on its face there is no need to resort to legislative history—plain language interpretation has been willfully ignored by courts and even the flimsiest claims in support of continued classification have been honored. So it comes as something akin to a shock to the system to see a judge actually weigh the importance of FOIA's disclosure policy against the claims that properly classified information needs to be protected.

The document in question outlined the U.S. position on the legal meaning of "in like circumstances" as part of the negotiations for the Free Trade Agreement of the Americas. The 34 countries involved in the negotiations agreed at the beginning that they would not disclose documents received as part of the negotiating process unless the originating country agreed to disclosure. Throughout the litigation, USTR argued that this agreement was meant to facilitate negotiations and foster trust among the negotiating countries and that unilateral disclosure would harm the foreign relations of the U.S. by making it appear to be an untrustworthy negotiator. The negotiating countries ultimately agreed to allow public disclosure of documents on December 31, 2013.

Part of the agency's problem was that Roberts continued to express skepticism of the claims USTR made to preserve the document's confidentiality. First, the agency argued that disclosure would undercut trust in the U.S. by other negotiating parties. But the agency also contended that disclosure would reveal its position and make it difficult to change or modify the U.S. stance. Roberts pointed out that "while the prospect of revealing foreign government information typically supports withholding disclosure under Exemption 1 (national security), the claim that a breach of the FTAA confidentiality agreement would harm national security is less compelling here since the United States would be revealing its own position only. USTR maintains that because the confidentiality agreement covered *all* of the material exchanged during negotiations, the loss of trust is the same. There is, however, a meaningful difference between the United States' disclosure of information that it receives in confidence from a foreign government, with the foreign government's understanding that the information will be kept secret, and the United States' disclosure of a document that it itself created and provided to others. While a breach of the confidentiality agreement will occur in either case, the resulting affect on the United States' foreign relations—the key factor for assessing whether the document is properly classified—is not identical."

Roberts observed that "USTR's arguments regarding loss of trust are at a high level of generality, asserting that the confidentiality agreement facilitates the 'give-and-take of negotiations' without articulating particular reasons why its foreign negotiating partners would have any continued interest in maintaining the secrecy of the United States' own initial position on the phrase "in like circumstances.' The harm resulting from breach of the confidentiality agreement here, and the asserted need to insulate negotiations from potential opposition from participating nations' 'vested local economic interests' in order to provide 'room to negotiate' and make it less likely that foreign partners will 'adopt and maintain rigid negotiating positions unfavorable to U.S. economic and security interests' is substantially mitigated because the FTAA negotiations are [no longer] ongoing." He added that "the defendants' failure to assert any particular present sensitivities implicated by Document 1 leaves the breach of confidentiality agreement as the sole basis for inferring a loss of trust. A per se rule that existence of a confidentiality agreement provides an adequate basis for proper classification of a covered document is flatly incompatible with FOIA's commitment to subject government activity to 'the critical lens of public scrutiny.'" Further, he indicated that the agreement that documents could be disclosed in

December 2013 was constrained by each country's ability to object to release of its own documents at that time. Roberts explained that this "supports CIEL's argument that the primary interest protected by confidentiality is a country's ability to determine the release of its own materials, not to keep others from releasing theirs."

Turning to the agency's other argument that disclosure would harm its ability to revise positions, Roberts noted that "if, as defendants maintain, trade negotiators understand that an initial position like Document 1 is a non-binding starting point, and that, accordingly, the United States may revise or withdraw it at any time, it is unclear why disclosure of the document 'reasonably could be expected to cause damage' to the United States' foreign relations by reducing future flexibility. . .Defendants have presented no 'logical or plausible' reason, why future negotiating partners would have so firm an expectation that the current or future United States administration would or should adhere to the same interpretation of 'in like circumstances' prevented in the FTAA context such that the United States will be impeded in presenting a different interpretation." (*Center for International Environmental Law v. Office of the United States Trade Representative*, Civil Action No. 01-498 (RWR), U.S. District Court for the District of Columbia, Feb. 29)

Views from the States...

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

Connecticut

A trial court has upheld the FOI Commission's conclusion that certain records requested from the University of Connecticut Health Center are not covered by the deliberative process privilege. Affirming the Commission's conclusions, the court observed that "a preliminary draft or note is one which is: (1) preparatory, (2) not a complete resolution of a matter in itself, (3) not germane to the eventual end product of the record, and (4) takes the form of deliberation over a matter. A document that is final in itself and not deliberative does not qualify for the exemption." Applying that standard, the court pointed out that "two documents are 2009 requests from a university staff member to obtain information regarding a proceeding involving the complainant at the university in 2005 and responses to the request. This exchange is complete in itself, and not deliberative; thus it is not a preliminary draft or note." As to another set of documents, the court noted that "the court agrees with the FOIC that while these documents are preliminary, they were disclosed to the recipient as part of an intra-agency communication. Therefore, they are subject to disclosure pursuant to [the FOIA]." (*University of Connecticut Health Center v. Freedom of Information Commission*, No. CV 11-6008847, Connecticut Superior Court, Judicial District of New Britain, Feb. 27)

Florida

A court of appeals has ruled that the City of High Springs properly redacted questions and answers from a pre-employment polygraph test given to a candidate applying to become a reserve police officer under the exemption in the Public Records Act for examination questions and answer sheets for exams administered by a government agency for the purpose of licensure, certification, or employment. The court noted that "the instant case provides a clear example of the exemption's application. It is undisputed that the polygraph examination here was given by a governmental agency—the City—and was comprised of questions and answers. Moreover, deposition testimony indicated the polygraph examination was intended exclusively for employment purposes as the City required applicants for employment as reserve police officers to undergo

ACCESS REPORTS

such testing." Further, "the exemption applies notwithstanding the fact that the City utilized a polygraph examiner employed by an outside law enforcement agency to actually perform the examination. The exemption requires only that the examination be 'administered' by a governmental agency, and the term 'administer' has been defined as 'to manage or supervise the execution, use or conduct of.'" Robyn Rush argued that the exemption was created solely to prevent prospective applicants from cheating on pre-employment examinations by looking at past questions and answers, a situation that did not apply here. The court rejected that claim, pointing out that "the language of [the exemption] does not limit its application to any certain type of examination or subject matter that might be explored in a pre-employment examination. And while the exemption certainly prevents other prospective applicants from gaining an edge in the employment application process through advance notice of test questions and possible answers, there is nothing in [the exemption] that states that this is its exclusive purpose." (*Robyn Rush v. High Springs, Florida*, No. 1D11-3714, Florida District Court of Appeal, First District, Feb. 23)

Tennessee

A federal court has allowed Richard Jones, Midwest Director of Al Sharpton's National Action Network, to continue his suit against the City of Memphis charging that the city's refusal to release public records to him because he was not a citizen of Tennessee violates the Constitution's Privileges and Immunities Clause. The court noted that the Third Circuit had found that a citizens-only provision in Delaware's Freedom of Information Act violated the Privileges and Immunities Clause in *Lee v. Minner*, 458 F. 3d 194 (3rd Cir. 2006) because it restricted the ability of non-citizens to engage in the state's political process with regard to matters of national political and economic importance. However, in *McBurney v. Young*, 2012 WL 286915 (4th Cir. Feb. 1, 2012), the Fourth Circuit declined to find such a right under the facts of the case before it and rejected the argument. But the federal court in Tennessee noted that the Fourth Circuit had accepted the existence of the right to advocate and decided only that it did not apply in the case before it. Applying this conclusion, the court interpreted "the contours of this new fundamental right under the Privileges and Immunities Clause to depend upon both the type of information requested and the use to which that information will be put. To the extent that challenges to residency requirements arise based on information of a personal, rather than national, importance, the Privileges and Immunities Clause will not cover such challenges. On the other hand, where a residency requirement restricts access to public records related to matters of national political and economic importance, that restriction will fall within the protection of the Privileges and Immunities Clause." Saying that it would be inappropriate to dismiss Jones' constitutional claim, the court pointed out that *Lee* stands for the proposition that "the right to 'engage in the political process with regard to matters of national political and economic importance' is protected under the Privileges and Immunities Clause. In light of the Fourth Circuit's acceptance of this right's existence in *McBurney*, the only two circuit courts to address the issue have found, whether explicitly or implicitly, that the right exists." The court then went on to conclude that Jones had made a valid claim under the Dormant Commerce Clause as well, which prohibits states from discriminating against other states for the purpose of economic protectionism. (*Richard Jones v. City of Memphis*, No. 10-2776-STA-dkv, U.S. District Court for the Western District of Tennessee, Feb. 13)

Washington

A court of appeals has ruled that Richard Germeau, the representative of the Sheriff's Office Employees Guild, which had a collective bargaining agreement with Mason County, had standing to bring a Public Records Act suit against the County for allegedly failing to respond to his request for records concerning the investigation of an incident involving a sheriff's deputy, but that he did not adequately notify the County that his request for records had been made under the PRA. Germeau provided a letter to the Sheriff's Office indicating that he was the union representative and that the Office needed to provide him with

any information created as part of the investigation of the sheriff's deputy. However, since the Office had decided to investigate the incident as if the sheriff's deputy had been the victim rather than the perpetrator, it told Germeau that there would likely be no records beyond the original sheriff's report of the incident. The sheriff's deputy made a PRA request for existing records. The Sheriff's Office provided the records to the sheriff's deputy and gave Germeau copies as the union representative. Nevertheless, Germeau filed suit, claiming the Sheriff's Office had failed to respond to his own request. The trial court ruled in favor of the Sheriff's Office on the grounds that Germeau did not have standing to bring suit and that his letter to the Sheriff's Office had failed to provide notice that it even was a PRA request. Germeau appealed. The appellate court found Germeau had standing, but concluded that his letter did not constitute a PRA request. Rejecting the County's standing argument, the court noted that "Germeau clearly had 'a personal stake' in his PRA action against the County. As the County asserts, most likely the Guild itself, not Germeau personally, would represent [the sheriff's deputy] in any internal disciplinary or adversarial proceeding if one arose. Nonetheless, Germeau was the Guild representative and, even in that capacity, he had 'a personal stake' in receiving the requested information." The court then pointed out that Germeau's letter had not mentioned the PRA and was given to the Sheriff's Office in the context of his position as union representative. The court indicated that "it was reasonable for the County to have believed that Germeau was requesting the documents under the collective-bargaining agreement between the Guild and the Sheriff's Office, independent of and unrelated to the PRA." (*Richard Germeau v. Mason County*, No. 41293-4-II, Washington Court of Appeals, Division 2, Feb. 28)

A court of appeals has ruled that documents disclosed by the Department of Ecology to Double H, L.P. in multiple stages cannot be considered as separate violations of the Public Records Act for purposes of calculating a penalty award. Double H made a request on Aug. 6, 2009 for records concerning the investigation of illegal hazardous waste disposal on Double H's farm. Ecology released documents in three stages, the last release being dated Jan. 27, 2010. Double H informed Ecology in January 2010 that it was continuing its original request and wanted any documents created since Aug. 7. Ecology told Double H it was required to submit a "refresher" request, which it did. On nine subsequent occasions, Ecology provided more documents to Double H totaling over 3,000 pages. Double H filed suit and the trial court determined that 495 was the number of days by which the agency's disclosures exceeded the statutory time limits. It also ruled that the request consisted of one batch of responsive records, not multiple groups as Double H claimed. The appeals court pointed out that "the PRA does not require records be divided into separate groups based on production date." It then observed that "the trial court made a balanced, reasonable decision supported by tenable grounds when selecting the same-subject group: Avoid strained groupings to encourage agencies not to withhold records until fully assembled, promote early segmented records production, and undercut the risk of creating multiple penalty-increasing groups. In essence, the trial court in its discretion decided Ecology should not be punished more severely for its continuous review and release of records under the circumstances of this case." (*Double H, L.P. v. Washington Department of Ecology*, No. 29918-0-III, Washington Court of Appeals, Division 3, Feb. 23)

The Federal Courts…

A federal court in New Orleans has ruled that day laborer Joaquin Navarro Hernandez and his pro bono attorneys are entitled to $51,000 in **attorney's fees** for forcing Customs and Border Protection to disclose more documents concerning its arrest of Hernandez at a convenience store in New Orleans as well as records about its policies for rounding up day laborers on civil charges. With Hernandez facing deportation, the New Orleans Workers' Center for Racial Justice helped him file an extensive FOIA request. When CBP

ACCESS REPORTS

failed to respond within six months, Hernandez filed suit, which prompted the agency to release 22 partially redacted pages from his immigration file. Dissatisfied with the agency's response, Hernandez's attorneys asked to depose several CBP employees knowledgeable about its record-keeping procedures and immigration enforcement tactics. The agency attempted to quash the depositions, but the court denied it motion. Based on information revealed in the depositions, CBP agreed to conduct further searches. The searches located more responsive documents, including records about the arrest of 62 other laborers with collaboration between other law enforcement agencies and local police. After an *in camera* review, the court ordered CBP to disclose these records with redactions for personal information. Hernandez's attorneys then filed for a fee award. The agency argued that Hernandez did not qualify for an award under the catalyst theory because the agency had produced most of the records voluntarily. While the court characterized that contention as inaccurate, it found that "only after the Court granted Plaintiff's motion for partial summary judgment, over Defendant's objections, were any of these documents released to Plaintiff. This order altered the legal relationship of the parties in Plaintiff's favor, which is all that is required to establish his eligibility for a fee award under FOIA." Moving to the question of entitlement, the court noted that although Hernandez had requested the records to help with his deportation proceedings there was a strong public interest in the documents released. "At present, there is a vigorous public debate on the topic of targeted immigration enforcement. . .[T[hese questions are of substantial public interest in the City of New Orleans, where the plight of the large population of immigrant worker who has assisted in rebuilding efforts after Hurricane Katrina has been a matter of particular concern. Here, Plaintiff has used the records disclosed as a result of this case to increase public awareness of the above issues. . ." As to Hernandez's need for the records, the court observed that "FOIA is essentially the only means available for an individual to obtain information for use in a deportation proceeding." Although the court found the number of hours claimed by Hernandez's two attorneys was reasonable, the court decided to reduce the hourly rate for both attorneys. (*Joaquin Navarro Hernandez v. United States Customs and Border Protection Agency*, Civil Action No. 10-4602, U.S. District Court for the Eastern District of Louisiana, Feb. 7)

A federal magistrate judge in New York has ruled that the State Department has so far failed to justify several claims pertaining to the search for records related to an agency report entitled "China: Profile of Asylum Claims and Country Conditions," particularly for all background material related to Part IV of the report, "Claims Based on Population Policies." Because the Bureau of Democracy, Human Rights, and Labor drafted the report, the agency focused its search in that office, although it also conducted a search of its Central Foreign Policy Files archive using the title of the report and the title of several subsections of the report as search terms. Richard Tarzia argued that the agency had narrowed the scope of his request by focusing its search only on materials used or relied upon by the drafter. But the court noted that "the Department's declarations suggest that its search was, in fact, based on the broadest reasonable interpretation of the Request. . . None of [the] searches were limited to documents relied upon or used by the drafter of the Report. Although the Department's search did not succeed in locating as many documents as Tarzia would have liked, [its] Declaration describes a comprehensive search of the DHRL files for any document remotely related to the Report." But the court faulted the agency for failing to adequately search for any non-public documents used by the author. The court noted that "missing from both declarations is any evidence that the Department undertook the obvious next step in a reasonable investigation—namely, determining what, if any, additional nonpublic documents the drafter may have relied upon in preparing the Report." The agency argued that it limited the search terms in its Central Files search so that it could limit the number of non-responsive documents that would be swept up in a broader search. Rejecting this claim, the court noted that "the fact that a broader search might produce documents unrelated to Tarzia's Request is irrelevant. The only pertinent question is whether broadening the search terms would result in a search 'that plainly is unduly burdensome.'" Tarzia also asked for records identifying those who worked on the report. The agency argued it was not required to create a record to provide such information, but the court observed that "while the

Department need not compile a list of contributors to the Report or answer a question regarding the Report's authorship, that does not mean the Department is relieved of its obligation to conduct a search for pre-existing documents in the Department's possession that may provide that information." While the court found the agency's explanations were sufficient to uphold its exemption claims, it found unconvincing the agency's claims that several emails were not **segregable.** The court indicated that "to the extent that the emails include purely factual information regarding these 'family planning practices' that is severable 'without compromising the private remainder of the documents,' they must be released." (*Richard Tarzia v. Hillary Clinton*, Civil Action No. 10-5654 (FM), U.S. District Court for the Southern District of New York, Jan. 30)

Judge Beryl Howell has allowed Sharif Mobley, a U.S. citizen currently imprisoned in Yemen, to continue his FOIA suit against the Justice Department after finding that Mobley's suit clearly indicated that he was challenging the agency's classification of various documents. The agency argued that Mobley had disavowed any intention of challenging the withholding decisions in his case. But Howell noted that Mobley had stated that although "he does not currently intend to challenge [the agency's] withholding determinations," he "reserves his right to challenge some or all of the withholdings." He also requested a *Vaughn* index. DOJ argued that Mobley was not entitled to request a *Vaughn* index unless he actually challenged some or all of the agency's exemption claims. But Howell pointed out that "despite the defendant's assertions, the Complaint does not 'explicitly disavow' that the defendant improperly withheld documents, but rather sets forth general allegations sufficient to maintain a cognizable FOIA claim." She indicated that "the plaintiff concedes in his opposition to the defendant's motion to dismiss that 'it is very likely that the records are properly classified and accordingly exempt under FOIA exemption (b)(1),' but this frank assessment of his own case does not negate the fact that the plaintiff initiated the instant lawsuit because he suspects that the defendant improperly withheld documents, and states in his Complaint that he intends to contest withholdings that he deems to be improper." However, Howell rejected Mobley's call for a *Vaughn* index at this stage. She noted that "the plain text of the statute does not require agencies to provide a list of withheld documents, but only to make a reasonable effort to estimate the volume of the documents withheld. . .Given the unambiguous text of the statute imposes no procedural requirement on agencies to provide a list of withheld documents at the administrative stage, the Court declines to devise one here." (*Sharif Mobley v. Department of Justice*, Civil Action No. 11-1437, U.S. District Court for the District of Columbia, Feb. 27)

Judge Emmet Sullivan has ordered disclosure of a 500-page report prepared for the court by attorney Henry Schuelke investigating allegations of misconduct on the part of Justice Department attorneys in the investigation and prosecution of former Sen. Ted Stevens (R-AK) for failing to report personal gifts. After Stevens was indicted and convicted, he lost his bid for re-election. Later, due to testimony from an FBI agent involved in the case, Sullivan threw out the verdict as a result of prosecutorial misconduct for failure to provide both Stevens and the court with information seriously undercutting the government's case. While Sullivan indicated when he announced the appointment of Schuelke to investigate the charges that he intended to make the report public, four of the six government attorneys accused of misconduct filed motions to block disclosure, arguing the investigation and report was akin to a grand jury proceeding and should remain sealed. Sullivan noted that Schuelke's report found that the case was "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated [Stevens'] defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." Finding that the public interest in disclosure far outweighed the privacy interests of the accused attorneys, Sullivan pointed out that "the government's ill-gotten verdict in the case not only cost that public official his bid for re-election, the results of that election tipped the balance of power in the United States Senate. That the government later moved to dismiss the indictment with prejudice and vacate the verdict months after the trial

does not eradicate the misconduct, nor should it serve to shroud that misconduct in secrecy. The First Amendment serves the important function of monitoring prosecutorial misconduct, but the public cannot monitor the misconduct in the *Stevens* case without access to the results of Mr. Schuelke's investigation, which are detailed in his five-hundred page Report." (*In Re Special Proceedings*, Misc No. 09-0198 (EGS), U.S. District Court for the District of Columbia, Feb. 8)

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.