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Washington Focus: A coalition of open government groups has sent a letter protesting a provision in the House version of the "Cyber Intelligence Sharing Protection Act of 2011" (H.R. 3523) that restricts public access to all cyber threat information provided to the government by the private sector. The letter noted that "much of the sensitive information private companies are likely to share with the government is already protected from disclosure under the FOIA. Other information that may be shared could be critical for the public to ensure its safety. The public needs access to some information to be able to assess whether the government is adequately combating cybersecurity threats and, when necessary, hold officials accountable."

OGIS Recommendations Pried Loose By Congressional Displeasure

After more than a year of waiting for OMB to approve the first set of recommendations issued by the Office of Government Information Services, OGIS bowed to congressional pressure Apr. 24, providing Congress with a copy of the recommendations, which were then quickly made public. On Apr. 13, OGIS Director Miriam Nisbet had sent a letter to Senate Judiciary Committee Chair Patrick Leahy and Ranking Minority Member Charles Grassley responding to their displeasure in a Mar. 13 oversight hearing that OGIS still had not reported to Congress as provided in the OPEN Government Act amendments to FOIA that created OGIS. In that letter, she declined to provide the recommendations, indicating that "we do not feel that activities needed to address OGIS's concerns rise to the level of recommendations to Congress at this time." But in a world where keeping good relations with an agency's oversight committee is crucial for getting funding and support, OGIS reversed course just over ten days later. Nevertheless, although the recommendations quickly became public, OGIS did nothing on its own to publicize the release.

In its two plus years of existence, Congress has been rather gentle with OGIS, understanding that it had budget constraints and that it would take some time for it to establish its role in the

FOIA world. But at the Mar. 13 Senate hearing, which originally was seen as nothing more than a Sunshine Week acknowledgement of the importance of FOIA, both Leahy and Grassley tore into Nisbet for her inability to get past the OMB review process and provide her recommendations to Congress. Leahy explained that his patience was beginning to wear thin and indicated that he expected Nisbet to do more to get her recommendations to the Judiciary Committee. However, he told Nisbet later in the hearing that his anger was directed more at OMB than at her and asked her whether a letter from him and Grassley might help move things along. Nisbet told him she would do everything she could to make the process move faster and agreed with him that a letter to OMB might be helpful. While Leahy's frustration was clear, it seemed to be based on his belief that OGIS was required to report to Congress regularly. Section (h)(2)(C) actually says that OGIS will "recommend policy changes to Congress and the President to improve the administration of this section," but does not provide a time frame for such reporting. As such, it is probably a matter of discretion as to when or whether OGIS reports to Congress. But being right on statutory interpretation doesn't help much if it angers those legislators who hold the agency's purse strings.

Grassley in particular used Nisbet's Apr. 13 letter as reason to once again castigate the Obama administration for failing to deliver on its promise of greater transparency. He told Josh Gerstein at Politico that "after promising to deliver a report on recommendations related to the Freedom of Information Act, OGIS seems to have punted and only provided a disappointing letter. The Office of Management and Budget has held up OGIS's report in the review process for over a year. The withholding of the OGIS report seems to be another example of the complete disconnect between President Obama's grand pronouncement about 'ushering in a new era of open government' and the actions of his administration."

It was clear that Nisbet did not know why OMB was taking so long to approve the OGIS recommendations, but OMB clearance has long been a kind of administrative hell where regulations and recommendations are sent to die or wither. Leahy, Grassley, and Nisbet herself have all been around long to enough to know and be frustrated by this administrative logjam. But while the OMB clearance process allows an administration to sit on regulations that it does not like, in this case it is less clear why OMB would have been so intransigent. The problem may have been nothing more suspicious than the usual glacial review by OMB. But politically it may have reflected a desire on the part of the administration to hold back on any independent recommendations from OGIS until the administration was able to get its own house in better order. If so, the ability of Grassley and other Republicans to use the intransigence to criticize the Obama open government policy indicates that such a delay largely backfired.

The recommendations themselves are not particularly controversial and actually track many of the discussions taking place between OGIS, the Justice Department's Office of Information Policy, and the FOIA community. OGIS has long complained that it receives too many Privacy Act inquiries that it does not have the statutory authority to resolve. To ameliorate this problem, OGIS indicated that it has been working with agencies to make it easier to find their privacy webpages and get assistance from individual agencies. In a related recommendation, OGIS noted that agencies have been unable to share relevant personal information with OGIS because it is not authorized by the Privacy Act. OGIS has suggested a model routine use exception for agencies that would allow them to share personal information to the extent needed to resolve a query to OGIS.

More forward-thinking, the third recommendation acknowledges OGIS's support for the FOIA Module pilot portal being developed by the EPA and the Department of Commerce. The recommendations note that "OGIS believes that the project has the potential to improve the public's access to government information and to save taxpayers' money by sharing agency resources and repurposing existing technology. Based on the results of the launch [in October 2012], OGIS would work with other agencies to consider how the Module might be useful to them in carrying out their statutory responsibilities."

OGIS also described a strategy developed to coordinate agency responses to multi-agency requests. OGIS pointed out that "this approach ensures agencies are aware that the request has been received by fellow agencies; puts the agency points of contact in touch with one another so they can share tips and strategies for fulfilling the request; and also helps avoid redundancies." The final recommendation was that OGIS continue to facilitate agencies training in dispute resolution.

By disclosing its recommendations to Congress, OGIS cut its potential losses with the legislators from which it draws primary support. But to the extent that these recommendations are still subject to administrative limbo because they have yet to be officially cleared by OMB, the administration continues to make itself look bad for no apparent reason and prevents agencies from actively considering and implementing the OGIS recommendations.

Thoughts from the Outside…

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

Report Finds No Evidence that AG FOIA Memos Make a Difference

By Bob Gellman

The Transactional Records Access Clearinghouse (TRAC) recently released a report from its FOIA Project about the operation of the FOIA under the Obama Administration. The report is available at http://wp.me/p11uxO-8u.

TRAC is a wonderful organization that does yeoman's work collecting compiling, and releasing statistics on FOIA and other government activities. I am a big fan of TRAC, which is run out of Syracuse University by David Burham and Sue Long, both old colleagues of mine. There is no other organization that I know of that digs out seemingly boring statistical data and then turns it into dazzling information of direct relevance to oversight of government activities. TRAC's technical skills, doggedness, and policy insights are all outstanding.

The focus of TRAC's new report is on the March 2009 memorandum from Attorney General Eric Holder regarding the FOIA. Holder was following up on President Obama's instruction issued the day after he was inaugurated: "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." Holder told agencies to make discretionary disclosures and to not rely automatically on FOIA exemptions. Holder also said that the Department of Justice would only defend a denial if disclosure would harm an interest protected by one of the statutory exemptions. Sounds great, but it also sounds familiar.

Did the Holder memo make any difference? TRAC's answer was no. Not only did TRAC find "little evidence that these new standards are actually being followed," some people reported to TRAC that that "Justice Department attorneys had become even more aggressive in defending anything that federal agencies chose to withhold." I am not as plugged into the FOIA community as I had been in the past, but I have heard similar things.

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I was not surprised at TRAC's conclusion. Based on the history of similar Attorney General memos on FOIA, it was predictable that nothing that the Attorney General said would make any real difference to disclosures under FOIA or to DOJ's litigation posture. I've been involved with FOIA since the late 1970s when I started working on FOIA matters on Capitol Hill. I was the principal House of Representative staffer for 17 years (ending in 1994). I watched some of the history of Attorney General FOIA memos first hand.

The Department has issued Attorney General memos on FOIA since shortly after the law passed. The first was in 1967, and a second memo followed the 1974 amendments to the act. These two memos, while not without their controversies, were interpretative. Holder's memo was hortatory, similar to memos issued by Griffin Bell (under Jimmy Carter) and Janet Reno (under Bill Clinton). These memos were issued more as a political statement supporting openness in government.

Republican administrations have shown less interest in appealing to what might be called the transparency lobby. In Republican administrations, there has been a more stated willingness by DOJ to defend agency withholding of documents no matter the reason. Some of this reflected the politicization of FOIA sparked in large part by the Reagan Administration. Prior to 1981, FOIA had been a largely non-partisan matter, with Members of Congress on both sides of the aisle seeking more openness.

The Reagan Administration's anti-FOIA activities included pursuit of legislative changes that would have gutted the law. The 1986 FOIA amendments were a mild version of what the Reagan Administration really wanted. At the beginning of the FOIA wars in the early 1980s, Attorney General William French Smith issued a sharply anti-disclosure memo on FOIA, reversing the Griffin Bell policy. The same thing happened during the first Bush Administration when Attorney General John Ashcroft issued an anti-disclosure memo overturning the Janet Reno policy.

Attorney General hortatory memos on FOIA have ping-ponged back and forth between pro-disclosure and anti-disclosure leanings. I never saw any significant evidence that an Attorney General directive ever made much of a difference either to actual disclosures or to FOIA litigation. I recall that a review during the Carter Administration found that only two existing FOIA cases were resolved because of the new DOJ pro-disclosure policy.

The pro-disclosure orders were just window dressing. They did not include any detailed instructions to Department litigators, any specific instructions to settle cases, or any process that oversaw litigation and rewarded litigators for resolving cases on the side of disclosure. The anti-disclosure orders were no different. It was all politics and positioning.

There are two main reasons vaguely pro-disclosure directives do not matter. First, litigators want to win cases. That's their nature and their job. To be sure, some litigators try to do the right thing and get to the right result at times. Some push for disclosure simply because they know they have a losing case. But the mindset of litigators is to oppose the other side and argue for the government's case.

There's nothing inherently evil about this. In most cases, we want government litigators to aggressively represent the government's interest. That's good if you happen to like the underlying law/objective (say, litigation over fraud in government contracting). If you don't like the government's policy or purpose, then aggressive litigation is bad. When the government's litigators aggressively or even moderately defend agency withholding of documents, FOIA advocates think that is terrible. To be

sure, agencies withhold documents more than they should, but not every requested document should be disclosed.

Second, you cannot and should not expect litigators to make policy. It is not their function or their approach. A case presents itself, and they defend the government. It would be nice to have a policy process with the ability to direct that some cases be resolved through greater disclosure, but that is not something that litigators do well.

This is why housing the FOIA oversight/advice function at DOJ has always been a mistake. When Justice Department lawyers put their thumb on the policy scale, you pretty much can tell which side it will be on. When being anti-disclosure was politically popular with the current administrations, the Justice FOIA shop became aggressive cheerleaders for withholding. Even when the political winds shift, it is hard to expect litigators to change their tunes quickly.

For the years I was on Capitol Hill, DOJ's FOIA positions were generally determined by what made it easier for the government to win FOIA cases. The Department did not care about transparency in general or about any other agency's concerns. DOJ was only interested in what made it easier for DOJ to litigate cases and what made it harder for the other side to succeed.

I am not taking political sides here. I'm not attacking or defending the Obama Administration. I don't think that Holder was poorly motivated. He just didn't succeed in getting his policy implemented. Grading on a curve, he pretty much gets the same score as every other Attorney General. No one ever succeeded.

If I have a side in this fight, it is mostly anti-DOJ. I'm not being critical because DOJ opposes transparency in court. That is its role. My criticism is over DOJ's lack of ability or willingness to express policy positions *and* to require its litigators to stick to those positions in cases. The TRAC report tellingly quotes someone from the Solicitor General's office who told the Supreme Court in a recent case that DOJ does not embrace the long-standing principle that FOIA exemptions should be applied as narrowly as possible. That was a stunning and a telling statement. I do not believe that either the President or the Attorney General would agree with the Solicitor's Office on that point if asked during a press conference. In litigation, however, DOJ takes any position to win the case at hand, happily ignoring clearly stated congressional intent and decades of case law to the contrary.

I do not dismiss all DOJ FOIA activities outside of litigation. DOJ produces guides and other materials that are helpful to agencies and to requesters, and recent efforts to meet with the requester community are noteworthy. These types of FOIA educational and operational functions have improved considerably since the worst days of the Reagan Administration. The policy expressed in the Holder memo may well have influenced these activities for the better. Whether DOJ has done a better job processing its own FOIA requests seems to be contested at present, with statistics being reported and debunked all over.

Regardless, it remains the case that DOJ lacks a policy process sufficiently independent from the litigation side to be useful. That's why the Holder memo (and other similar memos) failed to produce change. The shortcomings of DOJ on FOIA policy did not go entirely unnoticed by Congress. The absence of a balanced policy process is the principal reason the 1986 FOIA amendments put

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responsibility for giving government wide guidelines for the assessment of FOIA fees in the Office of Management and Budget and not in DOJ. Congress did not want the litigators to have their thumbs on the scale when the fee policy was being made.

Despite its lack of effect, I doubt that Holder's FOIA memo will be the last of its type. You might consider saving the TRAC report. When a new President is elected in the future, wait three years, change the names and dates, and reissue the report saying that Attorney General _____'s FOIA memo did not make a difference to FOIA litigation. Some things will never change.

Bob Gellman is a privacy and information consultant in Washington. He previously served as chief counsel and staff director for the House Government Information Subcommittee.

Views from the States…

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

Kentucky

A court of appeals has ruled that the City of Hopkinsville properly redacted all contact information from arrest records requested by the Kentucky *New Era*. The court first found that "the home addresses, telephone numbers, and driver's license numbers at issue amount to personal information." The court then rejected the *New Era*'s claim that disclosure of such information was in the public interest because it allowed the paper to independently contact the victims. Instead, the court noted that "the release of specific contact information would make it easier for the New Era to contact the witnesses or victims named in the police reports, but the public interest in this information is minimal since its disclosure reveals nothing about the Hopkinsville Police Department's execution of its statutory functions." Hopkinsville had appealed the trial court's finding that juvenile records were not exempt from the Open Records Act. The appeals court pointed out that "with respect to such records, we hold that along with the telephone numbers, home addresses, and drivers' license numbers, the names of juveniles may also be redacted [under the statute]." The court indicated that "we believe that allegations of stalking, harassment, and terroristic threatening of a juvenile 'touches upon the most intimate and personal features of private lives.' . . .[T]he public interest asserted by New Era in this circumstance is minimal. Due to the nature of these crimes, as well as the heightened privacy interest afforded to juveniles, we are compelled to find that the potential adverse impact on juvenile victims or witnesses outweighs any benefit to the public from releasing the juveniles' names contained in these reports." Finally, the court reviewed the trial court's conclusion that agencies were not allowed to unilaterally issue a blanket denial under the privacy exemption. The appellate court disagreed, noting instead that "blanket redactions do not necessarily violate the Open Records Act. . .Judicial review of such an action requires the courts to engage in a case-by-case analysis. Thus, a proper interpretation of the law allows the public agency to redact records from an open records request at their discretion, but it must meet the burden set forth in [the statute] when the redaction is challenged. To the degree the trial court's order would not allow Hopkinsville to make a blanket denial of production based on its interpretation of an exception to the Open Records Act prior to New Era's challenge, we reverse such a holding." (*Kentucky New Era v. City of Hopkinsville*, No. 201—CA-001742-MR, Kentucky Court of Appeals, Apr. 20)

Tennessee

A federal district court has ruled that the City of Memphis did not violate the Privileges and Immunities Clause in the U.S. Constitution when it denied a request for the winning bid on a city contract from non-Tennessee resident Richard Jones, who had requested the record as part of his volunteer work for Al Sharpton's National Action Network putting together a website pertaining to minority contracting opportunities. Although Jones was able to get the record once he hired a Tennessee attorney who requested it for him, he argued that his inability to obtain public records himself put him at a disadvantage in his civil rights advocacy in relation to the Tennessee Urban League, which because of its state citizenship was able to obtain records directly. In an earlier decision, the court had found that *Lee v. Minner*, 458 F.3d 194 (3d Cir. 2006), had established a right of access to information when it was needed to participate in the political process on issues of national consequence. In *Lee*, the Third Circuit found Delaware's citizens-only restriction violated the Privileges and Immunities Clause specifically because so many companies were incorporated in Delaware and, as a result, many state corporate decisions had significant national impact. But the federal court in Tennessee pointed out that "unlike Delaware, Tennessee is not home to corporations with importance on the national economic stage, and its public records are of lesser national import. Therefore, because Plaintiff did not request information enabling him to participate in the political process regarding a matter of national political and economic importance, the fundamental right identified in *Lee* was not burdened." Jones argued that his civil rights advocacy was a matter of national political importance, but the court observed that "Plaintiff's volunteer activities with NAN in making the website do not rise to participation in the political process regarding a matter of national political and economic importance due to the differences between corporate information in Delaware and a winning contract in Memphis. . ." The court added that "broadening the specific right of access to public records beyond the specific delineations articulated in *Lee* would be inappropriate and not in keeping with the traditional boundaries placed upon fundamental rights recognized by Privileges and Immunities Clause jurisprudence. Accordingly, Plaintiff's desired 'right to access information in order to assist minority' businesses and access to public records regarding non-economic information are not fundamental rights under the Privileges and Immunities Clause." (*Richard Jones v. City of Memphis*, Civil Action No. 10-2776-STA-dkv, U.S. District Court for the Western District of Tennessee, Apr. 11)

The Federal Courts…

In one of the first FOIA cases brought in the D.C. Circuit dealing directly with whether **metadata is a record under FOIA**, Judge Barbara Rothstein has allowed Judicial Watch to pursue its claims concerning the Air Force's response to a previous FOIA request. Judicial Watch requested all records related to the processing of its Nov. 9, 2010 request and all metadata for the Jan. 11, 2011 letter responding to the 2009 request. The parties agreed that the letter was created as a Microsoft Word document and was then turned into an Adobe Acrobat PDF and disclosed to Judicial Watch. However, the Air Force contended that the PDF was the final document and since it had already been released to Judicial Watch, the case was moot. Judicial Watch argued that the Microsoft Word document was a separate document that was responsive to its request for metadata. The Air Force agreed with Judicial Watch that the Word document was a separate document, but asserted that only the PDF file containing the electronic signature of the Air Force employee who signed it was the "particular document" in this case and that the Word document was therefore non-responsive to the current request. Rothstein disagreed with the agency. She noted that "this court construes '[a]ny and all metadata for the Air Force's letter' to encompass both the metadata embedded in the Adobe PDF file and that embedded in the Microsoft Word document file. The addition of [the] digital signature did not alter the nature of the letter. Rather, it made the file version in which the letter was written and the file version in which it was signed

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separate documents for the purposes of a FOIA request for 'any and all metadata' for that letter. The Microsoft Word document would carry its own unique metadata, and, if Judicial Watch is entitled to the metadata at all (an issue yet to be decided), that metadata would be encompassed by the original request. The production of the Adobe PDF file does not moot the request." While the agency focused on its mootness argument, Rothstein observed that it also "makes clear that it takes the position that metadata is not an 'agency record' under FOIA, and argues that such an interpretation is 'overbroad,' and 'cannot be reconciled with either the Act's legislative history or the D.C. Circuit's test for determining agency records.'" The agency requested "the opportunity to brief this position more fully should the court decide to reach the issue." As a result, Rothstein sent the case back to the parties for further briefing on the issue of whether metadata was an agency record. (*Judicial Watch, Inc. v. United States Air Force*, Civil Action No. 11-0932 (BJR), U.S. District Court for the District of Columbia, Apr. 10)

Judge Barbara Rothstein has ruled in a pending case originally assigned to Judge Paul Friedman that, while the FBI conducted an **adequate search** for records concerning Mafia member Gregory Scarpa, it is required to re-process records based on the results of a **representative sampling** of 192 pages of a total of 1,153 pages. Ruling in a FOIA suit filed by Angela Clemente for Scarpa's files, Friedman earlier had found that the agency had conducted an adequate search, but had disagreed with the agency's redaction of the number of informants reporting on Mafia issues or the amount of "operational funds" where that information was purely of historical significance. He ordered the agency to disclose that type of redacted information and the FBI did so throughout the representative sampling. Before Rothstein, Clemente tried once again to undermine the adequacy of the search by complaining that the FBI had failed to search its New York field office. Noting that Clemente had failed to send a request to the New York field office as required by the FBI's regulations, Rothstein indicated that "this requirement has been recognized by the D.C. Circuit. Judges in this district have repeatedly invoked it in rejecting the argument that Ms. Clemente makes here." She added that "Ms. Clemente is of course free to submit a request to the FBI's New York office, but that office was not required to respond to the request at issue here." But Rothstein found the agency had disclosed the informant information as required by Friedman only in the representative sample of 192 pages. Rothstein pointed out that "Ms. Clemente argues that these excisions were 'improper when made' and that similar errors would therefore likely be found if the redactions made from the non-sample documents were re-examined. Her argument is persuasive. Redactions were removed in explicit response to Judge Friedman's order from 26.5% of the sample documents. The D.C. Circuit has said that an error rate of even 25% is 'unacceptably high.'" She added that "there is no merit to the FBI's argument that Judge Friedman's decision in this case was the sort of 'post-response occurrence' that should not trigger 'judicially mandated reprocessing.' The crucial question is whether the redactions were proper under the standards applicable at the time those redactions were made. Judge Friedman's decision answered that question 'No' with respect to the historical reference to the number of FBI informants reporting on Maria issues and to the dispensation of operational funds. That information must therefore be released from *all* responsive documents." She also found the agency had not shown how it determined if some named individuals might be dead. She observed that "reviewing the current *Vaughn* index, the Court notes that the FBI has not said how it determined the life status of individuals named or identified in the sample documents. (That it released the names of certain dead individuals does not suggest that it made such a determination.) There is, moreover, no indication that the Bureau applied this method to determine the life status of individuals identified in the non-sample documents." (*Angela Clemente v. Federal Bureau of Investigation*, Civil Action No. 08-01252 BJR, U.S. District Court for the District of Columbia, Apr. 13)

Judge Rosemary Collyer has dealt another blow to pro se litigant Emmanuel Lazaridis, who took his minor daughter to Greece while his divorce from his U.S. wife remained unresolved, ruling that he had failed

to exhaust administrative remedies pertaining to his claim to the Social Security Administration for child and spousal benefits based on his ex-wife's disability. But Collyer once again rejected the **fugitive disentitlement doctrine** as a basis for denying Lazaridis' FOIA request. Lazaridis asserted that the agency was engaged in a conspiracy with the Department of Justice and the Department of State to deny him SSA benefits. Collyer noted that Lazardis did not have standing to represent his daughter. She pointed out that "this Court previously determined that Mr. Lazaridis 'lacks standing to sue on V.L.'s behalf because he is neither an attorney nor V.L's duly appointed representative as defined by Federal Rule of Civil Procedure 17(c)(1)' and it finds no basis for departing from that determination. In addition, 'a lay person such as Mr. Lazaridis can appear *pro se* but is not qualified to appear as counsel for others.'" Dismissing the benefits claim for failure to exhaust his administrative remedies, Collyer observed that "Mr. Lazaridis baldly asserts in the complaint that SSA has a policy of denying benefits to individuals otherwise entitled to benefits 'solely because there may exist an outstanding felony arrest warrant.' However, he admits that he has not been denied benefits for that reason, or for any other reason, and SSA indicates that he is mistaken about the policy." Collyer rejected the agency's claim that Lazaridis could not use the U.S. courts because he was a fugitive. She indicated that "this Court previously determined that the Department of Justice had failed to establish 'the requisite connection between Mr. Lazaridis' fugitive status and [the FOIA] proceedings,' and it finds no reason to depart from that finding here." (*Emmanuel N. Lazaridis v. Social Security Administration*, Civil Action No. 10-1386 (RMC), U.S. District Court for the District of Columbia, Apr.19)

A federal court in New Hampshire has ruled that the Manchester *Union Leader* failed to **exhaust administrative remedies** when it requested the names and addresses of six individuals who were picked up by Immigration and Customs Enforcement. The newspaper sent both an email and a letter to ICE's Office of Public Affairs. The newspaper then filed suit when the agency failed to respond. The newspaper amended its complaint to indicate that after filing suit it submitted an official FOIA and received redacted documents. It then filed an appeal. But the court noted that "it is not enough that a plaintiff has filed an initial FOIA request and that the agency denied the request. Rather, the plaintiff must also exhaust the right to administratively appeal that denial before filing suit." Although the *Union Leader* filed an appeal, the court observed that "the right to appeal is not exhausted merely by filing an appeal; it is only exhausted when the agency either (a) issues a final decision denying the appeal, or (b) fails to act on the appeal within twenty days . . . Neither is the case here. . .Union Leader's proposed amendment would therefore be futile, and its motion to amend is denied." Dismissing the case, the court pointed out that "this court has no desire to elevate bureaucratic form over substance. The exhaustion requirement serves important public interests. . . Union Leader must allow that appeal process to run its course before resorting to the courts." (*Union Leader Corporation v. U.S. Department of Homeland Security*, Civil Action No. 12-cv-18-JL, U.S. District Court for the District of New Hampshire, Mar. 23)

A federal court in Wisconsin has ruled that while the Menasha Corporation is eligible for **attorney's fees** because it substantially prevailed in its FOIA suit against the Justice Department, it is not entitled to them. The court had earlier ruled that the Justice Department waived its attorney-client privilege claims when the Environmental Enforcement Section and the Environmental Defense Section shared information with federal agencies involved in a Superfund clean-up suit because they had adverse interests in the litigation. Menasha then filed for attorney's fees. The court first rejected Menasha's claim that disclosure was in the public interest, noting that "the likelihood that these particular internal DOJ communications and memoranda will be disseminated beyond the litigation remains entirely speculative." The court found that Menasha's interest in the documents was not exactly commercial, but that the company clearly had a personal interest in the information. "The fact that Plaintiffs were not requesting information pertaining to their own liability does not

mean they did not have private interests in the information. . .Plaintiffs' interest in the information was still for its own private use in the litigation." As to the reasonableness of the government's position, the court pointed out that "while this Court did not agree with the government's interpretation of precedent, and indeed specifically ruled that DOJ was not justified in withholding the requested documents, given the lack of case law on point, I cannot conclude the government's withholding was entirely unreasonable or without basis." However, the court disagreed with the government's claim that business requesters were generally not eligible for attorney's fees. The court observed that "nothing in FOIA's language or structure indicates that a corporation or municipality should *per se* be barred from using this provision." (*Menasha Corporation v. United States Department of Justice*, Civil Action No. 11-C-682, U.S. District Court for the Eastern District of Wisconsin, Mar. 26)