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## In this Issue



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*Washington Focus: TRAC has highlighted a recent skyrocketing backlog at Immigration and Customs Enforcement. After analyzing the agency's annual FOIA report, TRAC discovered that ICE had only 50 pending requests at the end of FY 2011 but the number jumped to 2,903 at the end of FY 2012. The apparent reason for the sudden increase is that ICE was given responsibility for processing some of the backlog of Citizenship and Immigration Services. According to TRAC's analysis, ICE's backlog is expected to grow to over 13,125 by the end of September 2013, three times larger than it was at the end of FY 2012. . .Reporting on the results of a FOIA request filed by Bloomberg News with the Marine Corps for information about Beyonce's use of a pre-recorded vocal track when she sang the National Anthem at President Barack Obama's Inauguration, the Washington Post has observed that in 172 pages the agency redacted all identifying information about the pop star under Exemption 6 to protect her privacy.*

## Court Rules Remand Triggers Constructive Exhaustion

Writing for the Fourth Circuit, Circuit Court Judge Harvie Wilkinson has lambasted the Justice Department for its delay of more than two years in responding to John Coleman's request to the DEA for information about the drug carisoprodol. Finding that Coleman had constructively exhausted his administrative remedies when DEA took more than six months to respond to the Office of Information Policy's remand of Coleman's request, Wilkinson pointedly observed that the agency had already taken sixteen months for its initial response denying Coleman's request on the basis that he had failed to commit to pay an estimated $1,700 in fees. Coleman appealed the fee determination to the OIP, which took another seven months to conclude that DEA had misapplied its own fee regulations and to remand the request to DEA for reprocessing. Four months later, Coleman filed suit and DEA responded two months later reaffirming its original determination that, because he had previously worked as a pharmaceutical consultant, Coleman was a commercial requester and had failed to commit to pay the necessary

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search fees. Although Coleman argued that he was requesting the information for academic research, the district court sided with DEA, finding that Coleman had failed to ask for a fee waiver until he filed suit and had "refused to pay" the DEA's assessed processing fee before filing suit.

Wilkinson began by noting the importance of administrative exhaustion generally. He pointed out that "it is far better for the requester and the agency to reach a mutually satisfactory resolution on their own without the need for federal judicial intervention." But he observed that "without the prospect of judicial intervention . . .the right of citizens to examine the basic workings of their government would be severely compromised." He added that "given the extended and inexcusable agency delay Coleman faced while pursuing his FOIA request, we conclude that he constructively exhausted his administrative remedies before commencing this litigation."

Wilkinson pointed out that, although both DEA and OIP had missed the statutory deadline by many months, they still managed to respond to Coleman before he filed suit. Instead, it was DEA's inability to respond to OIP's remand that triggered Coleman's constructive exhaustion. Wilkinson indicated that "although FOIA does not explicitly contemplate remands following administrative appeals, it is inconceivable that Congress intended to allow agencies to escape FOIA's time limits by sitting on remanded requests indefinitely." He explained that "in setting a time limit for agencies to respond to initial requests and establishing constructive exhaustion as a means to enforce that limit, Congress expressed a clear intent to ensure that FOIA requests receive prompt attention from the applicable agencies. A request upon remand is still a request, and we therefore conclude that it, too, must be acted upon within twenty working days."

DEA argued that if an agency responded to a request before suit was filed constructive exhaustion is inapplicable. Wilkinson disagreed and noted that the statute provided two points at which constructive exhaustion could kick in—when the agency failed to respond to a request before the 20-day time limit or when the agency further failed to respond to an appeal before the 20-day time limit. He observed that "the mere fact that an agency has responded to the initial request does not make constructive exhaustion 'inapplicable' given that subsequent agency inaction following the initial response may mean that the agency has 'failed to comply with the applicable time limit provisions.'" He added that "the DEA's failure to reprocess Coleman's renewed request on remand in anything like a timely fashion violated the statutory time limits and thus triggered constructive exhaustion. . .The irony of the DEA's position is especially apparent here, where it contends that its belated and dilatory initial response gives it a free pass for all time."

DEA further argued that Coleman had failed to exhaust his administrative remedies as to his request for a fee waiver. But Wilkinson pointed out that "to conclude, as the district did, that Coleman exhausted his remedies only with respect to the commercial/noncommercial distinction and not with respect to the fee waiver question both chops this case too finely and overlooks the substance of Coleman's administrative correspondence." Wilkinson indicated that "the administrative claims he raised regarding his eligibility for noncommercial fee status and his eligibility for a fee waiver all address the same core question, namely how Coleman's request should be treated under FOIA's fee assessment scheme." He added that "a requester need not provide the agency with every nuance and detail of a particular claim before exhaustion can be found." Even if that were the case, Wilkinson observed, Coleman had adequately put before the agency his claim that he was not a commercial requester and that he was entitled to a fee waiver.

Wilkinson next rejected the DEA's claim that it properly rejected Coleman's request because he had not committed to pay fees. Wilkinson noted that "FOIA does not require any prepayment of processing fees before a requester may proceed to court to dispute the assessment of those very fees." He observed that "were we to require Coleman to prepay even a portion of the fee that he now challenges under FOIA, we would be adding a requirement to the statutory directive governing review of adverse fee decisions. Such an addition

would undermine the FOIA provision allowing de novo judicial review of an agency's denial of a fee waiver because the added hurdle would prevent those who cannot assemble the resources to prepay an assessed fee from obtaining judicial review of an agency's erroneous fee assessment." Pointing out that "'determining the proper fees which the agency was authorized to collect' is the whole point of these proceedings," Wilkinson indicated that "Congress contemplated challenges to fee decisions, yet made no mention of a prepayment requirement." Explaining that Coleman had substantively challenged his fee assessment on multiple occasions, Wilkinson noted that a provision added to FOIA by the 2007 OPEN Government Act prohibiting agencies from collecting fees if they missed the statutory deadlines would have clearly been applicable in Coleman's case except for the fact that the provision did not become effective until after Coleman had submitted his request. (*John J. Coleman v. Drug Enforcement Administration*, No. 11-1999, U.S. Court of Appeals for the Fourth Circuit, May 2)

## FOIA Citizenship Restrictions Don't Violate Constitution

In a unanimous decision, the Supreme Court has ruled that Virginia's citizens-only restriction in its Freedom of Information Act violates neither the Privileges and Immunities Clause nor the "dormant" Commerce Clause of the Constitution. Resolving a split in the circuits between the Third and the Fourth Circuit, the Court's ruling actually sets back the cause of access to state records because while it affirms the Fourth Circuit's ruling that Virginia's law does not run afoul of the Constitution, it overturns the Third Circuit's decision finding that Delaware's citizenship requirement violated the Privileges and Immunities Clause. While the ruling probably will have no effect at the federal level, the Court's apparent disdain for the importance of access to government information is both disconcerting and discouraging.

Virginia is one of a handful of states with a citizenship restriction for use of its FOIA. After successful litigation using the Privileges and Immunities Clause argument in the Third Circuit in *Lee v. Minner*, 458 F.3d 194 (2006) to overturn Delaware's citizenship restriction, Roger Hurlbert, a California data vendor who requests state property records and resells them to clients, and Mark McBurney, a former Virginia resident denied access to information about policies for enforcing delinquent alimony payments, brought suit against the State after they were denied access to records because they were not citizens. They lost at the district court level and again at the Fourth Circuit. Although both courts, interpreting *Lee*, assumed that the Privileges and Immunities Clause protected the right of public advocacy, they concluded that neither Hurlbert nor McBurney met the threshold for qualifying under the public advocacy test. They also found that Virginia's citizenship restriction did not violate the "dormant" Commerce Clause by preventing Hurlbert from practicing his profession.

Writing for the Court, Justice Samuel Alito found that neither Hurlbert nor McBurney enjoyed any constitutionally-protected rights that were violated by Virginia's citizenship requirement. Dismissing the claim that Virginia was preventing Hurlbert from practicing his chosen profession, Alito pointed out that "Hurlbert does not allege—and has offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens. Rather, it seems clear that the distinction that the statute makes between citizens and noncitizens has a distinctly nonprotectionist aim. The state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power." He then noted that Virginia citizens were the ones paying the costs of implementing the law. "In addition, the provision limiting the use of the state FOIA to Virginia citizens recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth."

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Alito then rejected the plaintiffs' argument that the citizenship restriction limited non-citizens' ability to access court records, including property records. Instead, Alito observed that "Virginia and its subdivisions generally make even these less essential records readily available to all. These records are considered non-confidential under Virginia law and, accordingly, they may be posted online." He explained that "requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia." However, as a practical matter, Internet access to property records is not as broad as FOIA access since online access requires knowing specific information about a property in order to access it, requiring a level of knowledge that frequently is not available beforehand.

Alito next dismissed McBurney's allegation that his right to use Virginia courts had been limited by his inability to access information. Alito noted that once McBurney's FOIA request had been rejected, he was told he could request personal information about his divorce under the Government Data Collection and Dissemination Practices Act, Virginia's version of the federal Privacy Act. And, indeed, McBurney was able to get most of his personal information.

Most crucially, Alito rejected the claim that "the challenged provision of the Virginia FOIA violates the Privileges and Immunities Clause because it denies [plaintiffs] the right to access public information on equal terms with citizens of the Commonwealth. We cannot agree that the Privileges and Immunities Clause covers this broad right." He observed that "this Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." He then retreated to an originalists' argument, noting that there was no historic tradition of access to government information and that FOIA laws in the United States dated back only about fifty years. He observed that "there is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted." (*Mark J. McBurney, et al. v. Nathaniel Young*, No. 12-17, U.S. Supreme Court, Apr. 29)

# 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.*

**Importance of Access to Government Information Knows No Borders**

**By Megan Rhyne**

The U.S. Supreme Court's FOIA ruling on Virginia's citizenship restrictions in its FOIA did not surprise me. The high court said it's OK for Virginia's state and local governments to reject FOIA requests made by residents from other states. Virginia is for lovers, but not for out-of-state FOIA requesters.

The ruling did not surprise me because there was already some precedent that access to government records is not a right of the people. The constitutional arguments about common calling and access to Virginia courts were not particularly compelling, so I kind of expected a ruling against the two plaintiffs whose FOIA requests were turned down because one was from Rhode Island and one was from California.

I was surprised that the decision was unanimous, though.

I thought the justices were at the same oral arguments as I was. I know, oral arguments are notorious for having little to nothing to do with the final outcome of a case, but I remember many of the questions asked and the answers given.

I thought the Chief Justice, at the very least, got it. He skeptically asked Virginia's solicitor general what real benefit there was to having such a provision—a provision only a few other states have; said the other way around, a provision nearly 45 other states have no use for.

"I'm just asking you why bother," he asked. "What cost is there to you, other than overhead? You don't want to keep how Virginia government operates quiet from outsiders when you let its citizens get the access, do you?"

I thought the justices were as dismayed as I was when the state's attorney called FOIA a "fad" of the 1960s. Instead, in the opinion, authored by Justice Alito, they all seemed to agree. The opinion referred derisively to FOIA as merely a "service" being provided to the citizens.

"There is no contention that the Nation's unity foundered in their [FOIA laws] in their absence," you said, Justice Alito. "Or that it is suffering now because of the citizens-only FOIA provisions that several states have enacted."

I wish the justices could all step into my world and hear from the people I hear from regularly.

• A New Jersey contractor who lost a bid for a Virginia job was denied his request to view the winning bid even though the contractor could use the bid to prepare a better bid in the future that could save the government money.

• The non-custodial parent of a child was refused information from a police department about her child because she lived in Colorado.

• A graduate student from an Alabama university was unable to get election records from Virginia to complete a nationwide research project on voting patterns.

• An academic in Massachusetts was denied records from Virginia that he was able to obtain from other states simply because he was from out of state.

Those are real examples. But there are certainly other possibilities:

• The Navy captain who has been stationed in Norfolk and is going to retire here but who is doing a final stint on a project in Florida would like information about the school his kids will be attending when they return.

• The lady who grew up in Richmond but got married and moved to Indiana. Her ailing mother is in Richmond and needs to go into nursing care, and the woman would like nursing home inspection records to inform her choice.

• The family relocating from California to Roanoke would like to see the city's comprehensive plan to determine the potential land use around the neighborhood where he'll be living.

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• The citizen of Bristol, Tennessee has concerns about the bridge he travels over every day to work in Bristol, Virginia and he'd like to view bridge inspection records.

I don't think the opinion gives any real thought to just how public records are used day in and day out by everyday citizens who are just trying to make sense of their world and how government is impacting it.

I am disappointed that the two points that seemed to resonate with the court—as to why denying access really wasn't such a big deal—was that (a) some of the information was available through other sources, and (b) Virginia taxpayers pay to maintain the fixed costs of maintaining the records.

On the first point, one wonders what would have happened if the information hadn't been available through those other sources? There is no requirement that records be provided online. Remote access to records is a service. Providing the records upon request, on the other hand -- which is what FOIA is set up to accomplish -- is a statutorily mandated governmental function of every state and local government body in the Commonwealth.

I was further disappointed to see the opinion describe real estate assessment records as "less essential" than property transfer records, while also noting that "Virginia and its subdivisions generally make [them] readily available to all."

It's funny because the reason the records are "readily available to all" because everyday taxpaying citizens have told their governments that they think these records are incredibly important, not "less essential." Meanwhile, the clerks of court have set up a system that makes "more essential" land records available online only to subscribers who have to pay handsomely and agree to multiple conditions before they can access them. Subscriptions are priced for the deep-pocketed title industry, not every day citizens.

The court made up for its dismissiveness of Virginia taxpayer interest in real estate assessment records by championing the taxpayers who "foot the bill" for the fixed costs of maintaining the records. Though the Chief Justice pointed out in oral arguments that the databases the plaintiffs asked for would be maintained even if the plaintiffs never asked for them, he agreed with the state's attorney's response to the point: that this was a "taxpayer-subsidized system."

Virginia officials were quick to trumpet the opinion as a victory. "Virginia taxpayers should not be required to subsidize FOIA requests from nonresidents," the Attorney General said in a statement.

The irony! Open records laws are for the taxpayers. It cannot be said in the same breath that restricting FOIA is somehow good for taxpayers.

What would happen if the justices' argument that Virginians should not be required to subsidize the cost of maintaining records for the sake of people from out-of-state were taken to its logical extreme? To do so, the fact that Nebraskans, Nevadans, New Yorkers, etc., pay taxes into state and local coffers when they eat, drink, shop and rent hotel rooms in Virginia would have to be ignored. So, too, would the support for local schools with the taxes they pay on property they own in Virginia, and the business and franchise taxes they pay on Virginia companies they are partners in; and the employee payroll taxes that go to Virginia where they work even though they live in Tennessee, Maryland, North Carolina, Kentucky or West Virginia.

Are we prepared to tell residents from the other 49 states they can't use our roads or get police and fire help if they wreck on those roads because they haven't paid into any of these services that Virginia is providing them?

The ruling also has officials declaring that the restriction protects the workload of the government employee who is taken away from other duties to fill an out-of-state request. The government can charge for the time and resources it takes to fill the request, of course, just like it can for in-state requests, so it's not saving money. It won't save time, either, because those out-of-staters are going to find someone in Virginia to make the very same request that the government will have to fill.

It is easy to brush off my comments here as a rant or as sour grapes. VCOG signed on to an amicus brief with other transparency advocates, and we lost. No one likes to lose. The opinion is constitutionally sound, and that's the end of it.

But Virginia's FOIA and open records laws all across the country have been marginalized by this opinion, by this provision. It is a cynical opinion, reducing the exchange of information to mere commercial transactions instead of recognizing it as the currency of democracy.

The justices did no one proud. Instead your unanimous opinion affirmed a sarcastic remark Justice Scalia made during oral arguments: "Is it the law that the State of Virginia cannot do anything that's pointless?"

Pointless indeed.

*Megan Rhyne is executive director of the Virginia Coalition for Open Government. VCOG's website is at www.opengovva.org.*

# 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 most of the FOI Commission's findings providing significant disclosure of psychiatric and medical records pertaining to Amy Archer Gilligan, convicted of the arsenic poisoning of a resident in her nursing home and confined at the Connecticut Valley Hospital from 1924 until her death in 1962. Gilligan was considered the inspiration for the play "Arsenic and Old Lace." Ron Robillard requested Gilligan's records and the Department of Mental Health and Addiction Services denied access based on the psychiatrist-patient privilege, the privacy exemption, and HIPAA. The FOI Commission found that many of the records did not qualify under the statutory definition of the psychiatrist-patient privilege, that Gilligan's death diminished any privacy interests and that the public interest in her case was significant enough to outweigh what privacy interests might exist, and that HIPAA did not constitute a bar to access when disclosure was required by the state FOIA. After reviewing the records *in camera*, the court concluded the FOI Commission's findings on the coverage of the psychiatrist-patient privilege were correct except for two documents that indicated a "provisional diagnosis." But the court found that copies of Gilligan's physical and dental examinations were protected by the privacy exemption. The court pointed out that "the department has met its burden that these records are not a legitimate matter of public concern and would be highly offensive if disclosed." Rather than deciding whether the FOIA provided a basis for disclosure under HIPAA, the court observed that a January 2013 addition to the HIPAA privacy rule provided that covered entities were required

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to abide by the privacy rules only for a period of 50 years after the death of an individual, meaning Gilligan's records were no longer subject to the restrictions of HIPAA. The department argued that Robillard should not get the benefit of the new regulation that became effective after he had filed his complaint. But the court observed that "here, a federal regulation has been adopted so that the complainant may have access to the requested records without HIPAA consideration. Even if the court were to analyze the appeal at the time the original request was made, and find that HIPAA did not allow access, the federal regulation has now been amended to allow access. If Robillard renewed his request today, the department would not have the protection of HIPAA." (*Freedom of Information Officer, Department of Mental Health and Addiction Services v. Freedom of Information Commission*, No. CV 12 6015969S, Connecticut Superior Court, Judicial District of New Britain, Apr. 29)

## Kentucky

A sharply divided appellate panel has ruled that the Council on Developmental Disabilities is not entitled to records concerning the death of a mentally retarded individual because it does not have a legitimate interest in the records as required by the relevant statute. The Council asked the Cabinet for Health and Family Services for records pertaining to the death of Gary Farris. The Cabinet denied access contending the Council was not a social service agency and, further, it did not have a legitimate interest in the records. The Council appealed and the trial court upheld the Cabinet's position, finding that the Council did not qualify as a social service agency under the statute and that because the Council had provided no services to Farris it did not have a legitimate interest in the records. The appeals court rejected the Council's claim that the Cabinet was required to "consult with local agencies and advocacy groups," pointing out that the statutory provision merely encouraged "the Cabinet to gather information from various agencies and other entities, rather than increasing the obligations of the Cabinet to disclose information. . ." The court added that "we find the trial court's interpretation of legitimate interest to be sound. Since the Council has no legally-recognizable interest in this case, the Cabinet met its burden of proof for denying the Council's open records request." The concurring judge pointed out that he did not agree with his colleague's legitimate interest argument, but joined in the result only because he concluded the Council did not qualify as an agency under the terms of the statute, which he interpreted as being limited to government agencies only. The dissenting judge indicated that the majority opinion was at odds with the Open Records Act's bias in favor of disclosure and read the meaning of "legitimate interest" far too narrowly. The dissent observed that "it is highly disingenuous to say that an agency [such as the Council] that has such a long-term investment in individuals with disabilities does not have a real, valid or genuine interest in what lead to Mr. Farris's death, regardless of whether the Council provided direct services to him or not." (*Council on Developmental Disabilities, Inc. v. Cabinet for Health and Family Services*, No. 2011-CA-000396-MR, Kentucky Court of Appeals, May 3)

## Maryland

The Court of Special Appeals has affirmed a trial court ruling that personally identifying information contained in nutrient management plans filed by chicken farms in the Chesapeake Bay watershed must be redacted but that the plans themselves were subject to disclosure under the Public Information Act. A coalition of environmental groups asked for the nutrient management plans. The Department of Agriculture withheld the plans based on a provision in the Water Quality Improvement Act requiring the Department to protect the identity of the individual for whom the plan was prepared for a period of three years. After the coalition of environmental groups filed suit, the Maryland Farm Bureau filed a motion asking the trial court to protect identifying information beyond three years. The trial court ruled that the Department was required to disclose NMP summaries older than three years, but that identifying information should be redacted. Affirming the trial court's ruling, the appellate court noted that "we agree with the [trial] court's judgment because it strikes a balance between the principled policy of permitting the public to inspect and evaluate

reports pursuant to the Public Information Act, all while continuing to remain sensitive to the applicant's personal information, specifically his or her identity. The [trial] court's ruling was beneficial to each party, as appellants had access to the NMP documents, and the Farm Bureau's members had protection regarding their identities and personal information." The court observed that "we conclude that the General Assembly intended that NMP documents could be disclosed regardless of the year, but that the [Department of Agriculture] must protect identifying information that would reveal specific applicants' identity during disclosure of such documents." (*Waterkeeper Alliance, Inc. v. Maryland Department of Agriculture*, No. 1289, Sept. Term, 2011, Maryland Court of Special Appeals, May 2)

## New Jersey

A court of appeals has affirmed a trial court ruling that records pertaining to communications to and from the Governor's Office and the Port Authority concerning job recommendations are protected by the personnel records exemption. In response to a request to the Governor's Office from reporter Shawn Boburg, the Governor's Office denied access to the records. Boburg filed suit, contending that the Governor's Office had failed to identify the exemptions claimed, that it was required to submit a *Vaughn* Index describing the reasons for withholding, and that Boburg was entitled to the records under the common law right of access. Agreeing with the trial court, the appeals court noted that "the judge correctly determined that the records sought by plaintiff were personnel records exempt from disclosure. . .[T]he records requested pertain to applications for employment at the Port Authority and referrals made by the Governor's Office concerning those applicants. The exemption for personnel records is not limited to records of persons employed by the State, its agencies or its political subdivisions. The exemption applies to personnel records of 'any individual' that are in the possession of any government agency that is subject to OPRA." Boburg argued the court limited his request to resumes and recommendation letters from the Governor's Office. But the appeals court noted that "the exemption for personnel records applies not only to the individuals' resumes and recommendations or referrals made by the Governor's Office. The exemption applies as well to documents received or maintained by the Governor's Office pertaining to those referrals." The court rejected Boburg's claim for a *Vaughn* index, indicating that "a *Vaughn* index was not required in this matter because the documents requested by plaintiff are clearly personnel records exempt from disclosure under OPRA." Dismissing Boburg's common law claim, the court observed that "the public has a strong interest in maintaining the confidentiality of personnel information and individuals have a reasonable expectation that the records will not be disclosed to the public, except as required by OPRA." (*North Jersey Media Group, Inc. v. Office of the Governor*, New Jersey Superior Court, Appellate Division, May 1)

## New York

A trial court has ruled that records allegedly showing that the New York Police Department worked with the CIA to conduct covert domestic surveillance of Muslim individuals are protected by a variety of exemptions, primarily those protecting law enforcement records. In response to a request from the Asian American Legal Defense and Education Fund and Muslim Advocates, the police department denied access to any records concerning the program. The plaintiffs then filed suit. They argued that the law enforcement exemption did not apply to completed investigations. But the court pointed out that "even a document that relates to 'prospective police activity' may be withheld. . .Even though counterterrorism and other intelligence activities do not culminate in prosecutions, these investigations, nonetheless, should be exempt as respondents' current and past investigations provide the NYPD with a 'basis for further investigation along lines of inquiry not heretofore pursued.'" The court agreed that disclosure of records could interfere with law enforcement investigations. "This court is satisfied that respondents have demonstrated that the raw, unevaluated field reports, derivative reports, and intermediate reports contain not only highly detailed information, but also

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contain revealing information that could potentially jeopardize the effectiveness of NYPD's undercover programs." The court found that disclosure could threaten the lives and safety of individuals. The court observed that "release of the requested documents could impair the lives and safety of the law enforcement community, undercover officers, confidential informants, and members of the public who cooperate with the NYPD's investigations and anti-terrorism efforts." Finding that disclosure would be an invasion of privacy, the court added that "releasing the documents in digital format could further heighten privacy concerns and potentially lead to exploitation by the media and misuse of data." Agreeing that several subparts of the request were not reasonably described, the court indicated that "[the police] have sufficiently demonstrated that a database search 'would be pointless, as there is no combination of search terms that would yield the universe of responsive documents,' as the vast majority of its records are not organized along racial, religious, or ethnic classifications." (*Asian American Legal Defense and Education Fund and Muslim Advocates v. New York City Police Department*, No. 50605(U), New York Supreme Court, New York County, May 6)

### Ohio

A court of appeals has ruled that the trial court erred in finding that images taken as part of the City of Chillicothe's traffic photo enforcement program but rejected by the City did not qualify as records under the Public Records Act. Timothy Rhodes requested a copy of all images made for use by the city's traffic enforcement program. The cameras used in the program were placed and maintained by Redflex Traffic Systems, located in Arizona, pursuant to a contract with the city. All traffic images were stored on Redflex computer servers which were not located in the city. Under the contract, Redflex made the initial determination whether or not an image showed a potential traffic violation. If Redflex found an image did not show a potential violation, the image was rejected and not sent to the Chillicothe Police Department. If Redflex determined that an image showed a potential violation, the image was sent to the Chillicothe Police Department for further review. The Chillicothe Police Department then reviewed the images and either rejected them or used them to issue citations. When Rhodes filed suit asking for all rejected images, the trial court concluded that rejected images were not public records. However, the appeals court distinguished between those images rejected by Redflex and those rejected by the city. The appeals court noted that "the record reflects that Redflex preprocessed the images; and the images which clearly showed no violation were rejected and never sent to the city. . .The 'non-forwarded rejected images' were not used by the city or Police Department to perform agency business; rather the images only might have or could have been used for such a purpose. Accordingly we, hold that the 'non-forwarded rejected images' are not records, and therefore, are not subject to the Act." But the court pointed out that "some of the 'rejected images' were forwarded by Redflex to the city of Chillicothe. The Chillicothe Police Department utilized some of the images in order to issue citations and rejected other images. The 'forwarded rejected images' were used by the city in performing a governmental function and in making decisions regarding whether a citation would be issued. These 'forwarded rejected images' are records subject to disclosure under the Act." (*State of Ohio e rel. Timothy T. Rhodes v. City of Chillicothe*, No. 12CA3333, Ohio Court of Appeals, Fourth District, Ross County, May 3)

## The Federal Courts…

Judge Ellen Segal Huvelle has ruled that Joan Wadelton, a former Foreign Service Officer, has not shown that she is entitled to **expedited processing** of her request concerning her employment. Joined by the media organization Truthout, Wadelton made three requests for records related to her employment. While State was able to process the third request within a matter of months, the agency denied Wadelton's request for expedited processing for all three requests. She then filed suit. Huvelle noted that Wadelton could not show that there was a "compelling need" for expedited treatment of her requests. In support of her position,

Wadelton argued that her story had been the subject of a series of articles by an international affairs blogger, her allegations had led to a 2010 investigation by State's Inspector General, that GAO was investigating her allegations, and that Truthout "intended" to publish an in-depth story about her. Huvelle found none of these claims rose to the level of "compelling need" under the statute. She noted that "this issue may be of concern to the Foreign Service community, but that does not mean that it is 'a breaking news story of general public interest. . .[A]n ongoing GAO investigation indicates that *someone* is concerned about this topic, but the GAO does many hundreds of investigations each year, many on arcane aspects of the functioning of the federal government that could hardly be said to be of great interest to the American public." Huvelle observed that State had provided no evidence that it would be injured by granting expedition. However, she pointed out that "the Court is well aware that many FOIA requesters are standing in line waiting for the agency to fulfill their obligations under FOIA and sequestration will undoubtedly only diminish the agency's ability to respond in the future to FOIA requests in a timely fashion." (*Joan Wadelton v. Department of State*, Civil Action No. 13-0412 (ESH), U.S. District Court for the District of Columbia, Apr. 25)

A federal magistrate judge in California has ruled that the Animal Legal Defense Fund has not shown why it is entitled to **discovery** in its FOIA suit against the FDA for inspection reports of Texas egg production farms. The FDA withheld information about the number of hens at each farm, the number of hen houses, the number of rows and floors per hen house, and the number of birds per cage under **Exemption 4 (confidential business information)**. To support its exemption claim, the agency provided affidavits from Chad Gregory, President of United Egg Producers; Steve Storm, Vice-President of Operations at Cal-Maine Food; and Layne Barry, Controller of Mahard Egg Farm, all of whom had attested to the confidentiality of the withheld information. In response, ALDF asked to depose the three on the question of the public availability of the information and its level of confidentiality. ALDF argued that "public disclosure of general information similar to the information that was redacted from the FOIA requested documents shows that the information Plaintiff seeks in discovery actually exists and that exemption 4 should not apply to the specific information sought in this case because disclosure would not cause competitive harm." Rejecting ALDF's discovery request, the magistrate judge noted that "the information that has been withheld in this case, which includes detailed data at an individual farm level, such as total hen population and number of birds per cage, could be used to determine an accurate estimate of a farm's egg production capacity. Plaintiff argues that general information about egg production capacity, at least at certain points in time, has been previously publicly disclosed. Yet discovery of the withheld information is not warranted even if there has been public disclosure of the general egg production information because the information that has been withheld also provides details about operations that have other competitive value." (*Animal Legal Defense Fund v. United States Food and Drug Administration*, Civil Action No. C-12-04376 EDL, U.S. District Court for the Northern District of California, May 7)

A federal court in New York has rejected the Justice Department's motion asking the court to reconsider its order requiring all attorneys in DOJ's Office of Immigration Litigation to **search** their email for possible contacts from the attorneys of individuals who had been ordered deported and had the decision overturned on appeal. The court had found that OIL attorneys were the DOJ attorneys most likely to have responsive records. But DOJ suggested the court may have overlooked the fact that several clusters of attorneys within OIL had already conducted email searches. However, the court pointed out that this handful of attorneys "did not cover the much broader universe of line attorneys within OIL who might have been contacted by opposing counsel regarding aliens' return. It was this state of facts that the Court was addressing in finding that the additional searches of OIL attorneys' emails are required." (*National Immigration Project of the National*

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*Lawyers Guild v. United States Department of Homeland Security*, Civil Action No. 11 Civ. 3235 (JSR), U.S. District Court for the Southern District of New York, May 7)

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