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Washington Focus: Open government groups have succeeded in blocking an amendment to the Farm Bill (S. 954) sponsored by Sen. Charles Grassley (R-IA) that would exempt information about concentrated animal feeding operations. In a letter urging Senators to oppose the amendment, the public interest coalition argued that the amendment "would eviscerate FOIA's balanced approach [to privacy], shielding from public view numerous types of information relating to owners and operators of livestock operations, regardless of the public interest at stake in disclosure, and regardless of whether there is any realistic prospect that those operations might be targeted by domestic terrorists if their location were known." The amendment was blocked because of an objection by Sen. Patrick Leahy (D-VT).

Bin Laden Raid Photos Properly Classified

In a decision that seemed inevitable from day one, the D.C. Circuit has affirmed the district court's finding that all the photos taken during the raid that resulted in the death of Osama bin Laden, including the photos taken of his subsequent burial at sea, are properly classified and fall within the parameters of Exemption 1 (national security). The public notoriety that accompanied bin Laden's death, including a rather detailed movie, "Zero Dark Thirty," as well as a book by one of the Navy Seals on the mission, made some hopeful that the government would be forced to disclose the photos. But the D.C. Circuit's decision confirms once again, if any confirmation was still needed at this point in time, that the threshold for classifying information is relatively low and that even if an agency is occasionally tripped up by a procedural error in classification—still a very rare occurrence—the courts will allow the agency to rectify their mistake. Nonetheless, the decision does shed a bit more light on why the CIA classified various photos.

While a number of media and public interest groups immediately requested the bin Laden photos after the raid was announced, Judicial Watch was the first to follow through with

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a lawsuit. By the time the legal issues began to be clarified, the parties agreed that the photos were agency records and that they were held by the CIA, not the Defense Department. In district court, the CIA argued the photos were protected by Exemption 1 as well as Exemption 3 (other statutes). But when he issued his ruling affirming the agency's position, Judge James Boasberg found that since the photos were clearly protected by Exemption 1 there was no need to consider the agency's Exemption 3 claim. The D.C. Circuit agreed that since the photos were covered by Exemption 1, there was no need to deal with the Exemption 3 claim.

In a Per Curiam decision, the D.C. Circuit affirmed Boasberg in virtually all respects but also identified a mild criticism of the procedural aspects of the classification. The government supported its case with several affidavits. An affidavit filed by John Bennett, Director of the CIA's National Clandestine Service, explained that many of the 52 photos were quite graphic and gruesome, that others displayed bin Laden's face in a way intended to enable facial recognition analysis, and that others showed the transportation and burial of bin Laden's body. Bennett indicated that disclosure could be expected to lead to anti-American propaganda, raise questions concerning whether bin Laden received a proper Islamic burial, and allow inferences about the CIA's use of facial recognition techniques. Another affidavit, filed by Lieutenant General Robert Neller, Director of Operations, J-3, on the Joint Staff at the Pentagon, also suggested disclosure could lead to violence and pointed to previous violent reactions after the publication of a Danish cartoon of the Prophet Muhammad and the alleged desecration of the Koran by U.S. soldiers in Afghanistan. Finally, Admiral William McRaven, Commander of the U.S. Special Operations Command, pointed out that some photos would allow identification of the special operations unit that conducted the bin Laden raid and would also reveal classified methods and tactics used in U.S. special operations.

Aside from challenging the substance of the classification, Judicial Watch argued that the CIA had failed to identify the original classification authority who classified the photos or to attest that the records had been properly marked. In response, the CIA provided an affidavit by Elizabeth Culver, the Information Review Officer for the CIA's National Clandestine Service. She explained the photos had initially been "derivatively classified" by a CIA official using criteria set out in the classification guide written by the CIA's Director of Information Management. Culver indicated the records had been marked "Top Secret" at the time Bennett filed his affidavit and that in an abundance of caution the agency had added other markings, including the identity of the derivative classifier, citations to the classification guide, the reasons for classification, and the applicable declassification instructions.

Addressing Judicial Watch's substantive challenges, the D.C. Circuit noted that "it is indisputable that the images at issue fall within the Executive Order [on Classification's] subject-matter limits. At least some of the images 'pertain to. . .intelligence activities' and all 52 images plainly 'pertain to. . .foreign activities of the United States.' As the district court observed, 'pertains' is 'not a very demanding verb.' And every image at issue documents events involving American military personnel thousands of miles outside of American territory." The court indicated that "there is also doubt that [the government's] declarations establish the requisite level of harm—the second substantive limit on classification—for a great many of the images."

As a result, the D.C. Circuit noted, Judicial Watch focused on the "most seemingly innocuous of the images: those that depict 'the preparation of [bin Laden's] body for burial' and 'the burial itself.' Judicial Watch contends it is unlikely that the disclosure of those images would cause any damage, let alone exceptionally grave damage, to U.S. national security." But the D.C. Circuit pointed out that the government's affidavits taken as a whole "support their declarants' determinations that releasing any of the images, including the burial images, could reasonably be expected to trigger violence and attacks 'against United States interests, personnel, and citizens worldwide.'"

Judicial Watch attacked the government's harm claims as speculative and urged the court not to accept them. But, recognizing the low threshold for classifying the photos, the D.C. Circuit pointed out that "it is important to remember that this case does not involve a First Amendment challenge to an effort by the government to suppress images in the hands of private parties, a challenge that would come out quite differently. Rather, it is a statutory challenge, in which the sole question is whether the CIA has properly invoked FOIA Exemption 1 to authorize withholding images in its own possession." The court added that "as we have said before, 'any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent.' Our role is to ensure that these predictions are 'logical' or 'plausible.' We agree with the district court that the CIA's declarations in this case cross that threshold."

Turning to Judicial Watch's procedural claims, the D.C. Circuit first dismissed the public interest organization's contention that the records were classified after it made its FOIA request. Instead, the D.C. Circuit noted that "Judicial Watch's factual premise is mistaken, as the CIA has averred that the images were in fact classified before it received appellant's FOIA request and there is no evidence to the contrary." The D.C. Circuit found Judicial Watch's claim that the initial derivative classification of the photos was improper of greater import. The court indicated that "even if the CIA is right that documents can be derivatively classified and marked in this way—and we express no view on the matter—we cannot determine whether derivative classification of the images was proper without some description of the classification guide on which the derivative classifier purportedly relied. Yet in this case, the CIA has provided no description of the guide's provisions, not even a general description, that would permit us to determine whether the derivative classification was properly based on the guide." Noting that "in some cases, an agency's silence on such a matter would merit a remand requiring an agency official to review the documents and file an additional affidavit, or in rare cases, requiring the district court to review the documents *in camera*," the court concluded that "in this case, however, we already have a declaration from Director Bennett, who has original classification authority, averring that he reviewed the images and determined that they were correctly classified as Top Secret." (*Judicial Watch, Inc. v. United States Department of Defense and Central Intelligence Agency*, No. 12-5137, U.S. Court of Appeals for the District of Columbia Circuit, May 21)

Views from the States…

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

Kentucky

The Attorney General has ruled that two instructors at Hazard Community and Technical College may have access to student complaint letters concerning their teaching under the exception in FERPA which allows disclosure of non-identifying information when there is a legitimate educational interest in the records. The AG noted that "under this exception, [the two teachers] are entitled to the records based on their desire to identify deficiencies in their performance and to correct those deficiencies to meet the academic needs of future students. Given the fact that no remedial measures were taken relative to the complaints, access to letters may be the only mechanism by which [the two teachers] can hope to improve their performance. No legitimate educational interest would be served by disclosure of information that identifies the students, such as their names, addresses, or personal characteristics, and this information may, consistent with FERPA, be redacted. The difficulties occasionally associated with this process are ameliorated by the fact that none of the

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letters are handwritten." (13-ORD-076, Office of the Attorney General, Commonwealth of Kentucky, May 17)

Minnesota

A court of appeals has ruled that there is sufficient evidence that the Middle-Snake-Tamarac Rivers Watershed District Board knowingly violated the Open Meetings Law by taking action at a special meeting that was not included in the public notice of the meeting for the plaintiffs to withstand a summary judgment motion. The Board provided notice of and held a special meeting to consider permit applications. During the meeting, the board approved repairing a pedestrian walkway, a matter not covered by the notice. The plaintiff then filed suit, claiming a violation of the Open Meetings Law. The plaintiffs argued that an amendment to the Open Meetings Law effectively changed the threshold of violation from a "specific intent" to violate the law to a general intent to do so. The court disagreed, noting instead that "the specific intent to violate [the law] is required with or without the word. That is, expressly adding the modifier 'specific' to the operative adverb 'intentionally' would be superfluous since the plain language informs the reader that the offender must intend a specific thing: *to violate the statute*." The court pointed out that the board members' board experience provided a legal implication that they were familiar with the Open Meetings Act. Finding evidence that the notice was insufficient, the court observed that "it is true that the statute declares only what is required in the notice of a special meeting and does not *expressly* prohibit board action beyond the noticed purpose of the meeting. But the prohibition to act beyond the notice is necessarily implied in the notice requirement (or the notice requirement is meaningless)." The court indicated that "the board members are presumed to know that deciding matters undisclosed to the public invites the kind of publicly unscrutinized decision-making that is avoided when board members follow the requirements of the open meetings law." (*Elden J. Elseth v. Roger Hille*, No. A12-1496, Minnesota Court of Appeals, May 13)

New Jersey

Ruling on a case remanded by the appellate court to determine if the law firm of Drinker Biddle & Reath had a common law right of access to unfiled depositions in a case brought by the state against Exxon, the trial court has found the records are privileged and not subject to a common law right of access. The court noted that "it is clear to this court that disclosure of the unfiled deposition transcripts could have a serious effect on agency decisionmaking and the investigatory proceedings instituted by the State against alleged polluters. Plaintiff, as the representative of parties against whom the State may prosecute environmental actions, will be privy to the mental processes and strategy of the attorneys representing the State in those matters. The State, on the other hand, would have no reciprocal right to the unfiled discovery in the custody of plaintiff and other private attorneys who represent parties in environmental litigation. The State would obviously be at a severe disadvantage in prosecuting such matters." The court observed that "stated simply, the general societal interest and the pecuniary private interest of itself and its clients asserted by the plaintiff in support of its application do not outweigh the State's substantial interest in favor of confidentiality of unfiled discovery materials." (*Drinker Biddle & Reath LLP v. New Jersey Department of Law and Public Safety, Division of Law*, New Jersey Superior Court, Law Division, May 14)

Ohio

The supreme court has ruled that a defendant's public records request for records pertaining to his citation for drunk driving is the equivalent of a discovery request and requires him to allow the state reciprocal discovery rights. Rather than request discovery, Gary Athon's attorney's made a public records request. After receiving the responsive information, the State moved to take discovery against Athon, claiming that his public records request was equivalent to discovery. The trial court sided with the state, but the appeals court

reversed, finding that a public records request was not the equivalent of discovery. The supreme court disagreed. The court noted that "Athon's claim that he is not subject to reciprocal discovery because he has not made a demand on the state is not well taken. When an accused directly or indirectly makes a public records request for information that could be obtained from the prosecutor through discovery, the request is the equivalent of a demand for discovery and triggers a duty to provide reciprocal discovery as contemplated by [the Rules of Criminal Discovery]." (*State of Ohio v. Gary Athon*, No. 2012-0628, Ohio Supreme Court, May 15)

Virginia

In response to a request concerning Attorney General Ken Cuccinelli's involvement with Star Scientific, a company that allegedly provided stock to Cuccinelli, the Attorney General's office has declined to respond to the request, claiming that since it is an independent constitutional office it is not subject to FOIA. The AG noted that "the Attorney General is an executive constitutional officer who is separate and apart from the executive constitutional office of the Governor." The AG pointed out that "given the constitutional structure and the statutory definitions, the premise of your request is inapplicable to this Office." While a line of supreme court decisions found the FOIA did not apply to constitutional officers, the *Charlottesville Daily Progress* observed that the legislature specifically rejected that holding, adding language to FOIA indicating that "constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records." (Letter from James E. Schliessmann, Senior Assistant Attorney General, Commonwealth of Virginia, May 15)

Washington

The supreme court has ruled that the Seattle Housing Authority must redact personally-identifying information from its grievance hearing decisions and disclose the decisions to the Resident Action Council in the requested electronic format. SHA, a state agency created in part to implement federal public housing law, originally released redacted versions of the grievance hearing decisions in hard copy without any explanation of its decision. When RAC sued, the trial court found that the grievance hearing decisions were public records under the Public Records Act, that SHA was required to disclose them after appropriate redaction, that the agency was required to provide the records in electronic format, and that SHA was required to pay a $25 a day fine for each day it had continued to violate the PRA. Upholding the trial court's decision, the supreme court issued a broad ruling explaining the way in which the exemptions applied. The court published an appendix of the 141 exemptions in the PRA, dividing them primarily into categorical and conditional exemptions. Noting that any exemption could become inapplicable if exempt information was redacted, the court pointed out that any records that could be cleansed through redaction had to then be disclosed. It rejected SHA's contention that records were exempt if they fell within a categorical exemption. Instead, the court noted that "SHA's suggested approach to exemption and redaction is untenable. If redaction sufficiently protects privacy and governmental interest—that is, if redaction can render all exemptions inapplicable—disclosure is required. Thus, SHA's unredacted grievance hearing decisions are not absolutely exempt from production and remain subject to the PRA's redaction requirement." (*Resident Action Council v. Seattle Housing Authority*, No. 87656-8, Washington Supreme Court, May 9)

In a decision that seems to contradict its ruling on the use of redaction to promote disclosure of partially exempt records, the supreme court has found that internal emails from Ameriquest that were turned over to the Washington Attorney General during a multistate investigation of improper mortgage practices are exempt from disclosure under the provisions of the federal Gramm-Leach-Bliley Act that prohibit disclosure of customer information to non-affiliated businesses without consent even if personal information has been

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redacted. In a 2009 ruling in the case, the supreme court had concluded that the bulk of the records were exempt under the GLBA and had sent the case back to the trial court to apply its ruling. The case involved a request under the Public Records Act from an attorney and after considering the supreme court's ruling, the Attorney General decided to disclose a smaller subset of emails. The trial court again sided with the Attorney General and the case went back to the supreme court. This time around, the supreme court once again ruled that all emails containing customer personal information were exempt, but that any other records not containing personal information were not protected by the investigative records exemption to the PRA. Emphasizing its earlier decision, the court noted that "the AGO is a nonaffiliated third party that received the E-mails and the nonpublic information they contain through the GLBA's exception for investigations. Accordingly, the AGO is not permitted to 'use' the nonpublic personal information for something besides its investigation. In [our first decision in this case], we held quite clearly that the definition of 'use' includes redaction. Therefore, simply by redacting the personal identifiers in the E-mails, the AGO has 'used' the information, regardless of what is left behind in the messages. . .[T]he AGO is not permitted under the GLBA to release the E-mails it received from Ameriquest as part of its investigation when they contain nonpublic personal information, even with its proposed redactions." Finding that Ameriquest had not met its burden of proving that the investigatory records exemption applied, the court pointed out that "Ameriquest has failed to demonstrate how an exemption applies or how it or a vital government function would be substantially and irreparably damaged. Moreover, Ameriquest has produced no authority or evidence to prove that the public lacks a legitimate interest in monitoring agency investigations." (*Ameriquest Mortgage Company v. Office of the Attorney General of Washington*, No. 87661-4, Washington Supreme Court, May 9)

The Federal Courts...

Judge Royce Lamberth has ruled that while the FCC conducted an **adequate search** for case file records pertaining to a 2004 investigation of SBC Communications, it has failed to show that two documents—a draft Consent Decree and a draft compliance plan—are protected by **Exemption 4 (confidential business information)**. COMPTEL, the plaintiff, argued that the search was inadequate because the agency had provided emails from only one attorney even though as many as 17 agency attorneys had been involved in the case. But Lamberth explained that "COMPTEL requested correspondence and internal FCC emails from [a specific] case file. COMPTEL did not request that the FCC search all agency emails for the information. Given that COMPTEL requested information from a discrete source, the method of the FCC's search appears to have been reasonable." He added that "similarly, the fact that the FCC produced one version of a particular document and not two different versions of the same document does not necessarily suggest that the search method was inadequate. Again, COMPTEL requested information only from a discrete FCC file." The agency claimed that the two documents contained confidential information that was given by SBC voluntarily. Rejecting that characterization as insufficient, Lamberth pointed out that "merely labeling information as 'commercial' or 'financial' is exactly the sort of description that the Court has already rejected as inadequate. . .Even with an incredibly broad definition of commercial or financial information, the government must at least provide the court with sufficient, non-conclusory detail to show that the information falls into this category." He added that "the FCC does not explain how all portions of a document originally prepared by its own staff can be considered 'obtained from a person.' While it is possible that the government relied on information from SBC to draft parts of the original version [of the Consent Decree], it seems unlikely, and the FCC has not met its burden to show that this is true for the entire document." He pointed out that "the Consent Decree was eventually made public and the terms of the Compliance Plan are reflected in that public Consent Decree. Any portions of the redacted documents mirroring the public versions cannot be redacted here." Lamberth dismissed the fact that COMPTEL was a competitor of SBC as irrelevant, observing that "the FCC simply hasn't met its burden to show that this information is commercial or financial information, obtained from a

person, *and* privileged or confidential. The identity of the requester and the purpose of the request are irrelevant to whether the agency has met its own burden to justify the invocation of a FOIA exemption." (*COMPTEL v. Federal Communications Commission*, Civil Action No. 06-1728 (RCL), U.S. District Court for the District of Columbia, May 20)

Overturning a decision by the Merit Systems Protection Board, the Federal Circuit has ruled that a disclosure of sensitive security information by former Air Marshal Robert MacLean to an MSNBC reporter was protected under the Whistleblower Protection Act. In June 2003, all Air Marshals were briefed on a potential plot to hijack U.S. airliners. Shortly after the briefing, TSA sent an unencrypted text message to the Marshals' cell phones cancelling all missions on flights from Las Vegas until early August. Alarmed that the cancellation policy during a hijacking threat might endanger the flying public, MacLean complained to his supervisor and to the Office of the Inspector General. When told that nothing could be done, MacLean told an MSNBC reporter. An article critical of the directive was published and the agency withdrew the directive after criticism from several members of Congress. In 2004, MacLean appeared on NBC Nightly News in disguise to criticize TSA's dress code, which he believed allowed Air Marshals to be easily identified. His voice was recognized by someone at the agency and an investigation was initiated. MacLean admitted to disclosing the text message to the MSNBC reporter and he was terminated for unauthorized disclosure of sensitive security information. Before the MSPB, MacLean argued the disclosure of SSI was protected by the Whistleblower Protection Act, but the Board concluded that because unauthorized disclosure of SSI was prohibited by law, MacLean's disclosure was not covered by the WPA. Finding the disclosure was covered by the WPA, the Federal Circuit noted that "the 'detrimental to transportation safety' language of the [Aviation and Transportation Safety Act] does not describe specific matters to be withheld. It provides only general criteria for withholding information and gives some discretion to the Agency to fashion regulations for prohibiting disclosure. Thus, the ATSA does not 'specifically prohibit' employee conduct within the meaning of the WPA." The court observed that "in spite of the WPA, Congress remains free to enact statutes empowering agencies to promulgate and enforce nondisclosure regulations, and it has done so in the ASTA. . . The WPA does not prohibit the Agency from following the ATSA's mandate to regulate public access to information that the Agency might otherwise be forced to disclose under the Freedom of Information Act." (*Robert J. MacLean v. Department of Homeland Security*, Civil Action No. 2011-3231, U.S. Court of Appeals for the Federal Circuit, Apr. 26)

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