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Washington Focus: Sen. Ben Cardin (D-MD) has introduced an alternative amendment (S. 1159) to the farm bill that would protect privacy rights of feed operators while providing for public access as well. Indicating its support of Cardin's amendment over the amendment recently offered by Sen. Charles Grassley (R-IA), the Openthegovernment.org noted that Cardin's bill would provide a balanced approach to weighing the public interest in disclosure against an individual's privacy interest, and reinforce existing privacy protections for farmers and their families.

Court Dissolves Injunction Prohibiting Disclosure of Medicare Reimbursement Data

Judge Marcia Morales Howard of the U.S. District Court for the Middle District of Florida has dissolved a 1979 injunction granted by Judge Charles Scott permanently prohibiting the Department of Health and Human Services from disclosing identifiable personal information about physicians' Medicare reimbursements because it violated the Privacy Act. While, the 33-year-old injunction has provided both a regional and national basis for not disclosing Medicare reimbursement information, it returned recently to the legal discussion of access to such data when both the Eleventh Circuit in *Alley v. Dept of Health and Human Services*, 590 F. 3d 1195 (11th Cir. 2009), and the D.C. Circuit in *Consumers' Checkbook v. Dept of Health and Human Services*, 554 F.3d 1046 (D.C. Cir. 2009), cited its continued existence as a reason for preventing FOIA access to such records. In *Alley*, the Eleventh Circuit flatly said that based on the Supreme Court's ruling in *GTE Sylvania v. Consumers Union* , 445 U.S. 375 (1980), the continued existence of the Florida injunction posed an absolute bar to disclosure of regional Medicare reimbursement data until such time that the Middle District of Florida dissolved the injunction. As a result, Jennifer Alley, who's Alabama-based Real Time Medical Data, had requested the regional Medicare reimbursement information only to be rebuked by the Eleventh Circuit, asked the Middle District of Florida to dissolve the injunction. Alley's challenge to the injunction was joined by Dow Jones, publisher of the *Wall*

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Street Journal, whose agreement with HHS for limited use of non-identifying data had proven unsatisfactory. Urging Howard to uphold the injunction were the Florida Medical Association and the American Medical Association, the two parties who were originally granted the injunction. While Alley and Dow Jones argued the access and privacy expectations of the data had changed dramatically since 1979, HHS took the position that a 1982 change in the Eleventh Circuit's interpretation of the extent to which the Privacy Act provided for injunctive relief had invalidated the legal underpinnings of the 1979 injunction.

Howard emphasized the importance of understanding the legal basis for Scott's 1979 injunction. She carefully explained the posture of the case, noting the FMA had challenged disclosure of the data by alleging such action would violate FOIA, the Privacy Act, the Administrative Procedure Act, the Trade Secrets Act, and the Social Security Act. Scott had found that neither the Trade Secrets Act nor the Social Security Act provided a basis for prohibiting disclosure. But after finding the data qualified as "similar files" under Exemption 6 (invasion of privacy) of FOIA, he concluded that once it was determined that the records were not required to be disclosed under FOIA, the Privacy Act prohibited their disclosure without written consent of the subject individual. Although the FMA argued that the HHS regulation permitting disclosure was contrary to the APA, Scott only analyzed the APA on the secondary issue of whether the FMA had standing to challenge disclosure of business-related personal data, which both the 1975 OMB Privacy Act Guidelines and the HHS implementing regulations asserted were not covered by the Privacy Act. Scott decided the OMB and HHS guidance was contrary to the Privacy Act, and, having concluded the FMA had standing, granted them an injunction prohibiting any current or future disclosure of the data.

Having thoroughly reviewed Scott's reasons for granting the injunction, Howard indicated that it was clear that Scott had granted the injunction based specifically on his conclusion that disclosure of the data would violate the Privacy Act. She rejected the FMA's contention that the injunction was equally based on the APA, noting instead that "the Court is convinced that Judge Scott granted the relief at issue here as a remedy available for violation of the Privacy Act. Plaintiffs' suggestion that in granting such relief, Judge Scott acted pursuant to the APA simply finds no support in the record or Judge Scott's decision." She added that "having found that the Secretary's proposed disclosure would violate the Privacy Act, the Court entered the 1979 FMA Injunction as a remedy authorized by the Privacy Act."

Howard next turned to the matter of whether the injunction was still valid under current interpretation of the Privacy Act. HHS, joined by Alley and Dow Jones, argued that the Eleventh Circuit's 1982 decisions in *Edison v. Dept of Army*, 672 F.2d 840 (11th Cir. 1982) and *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982), concluding that the Privacy Act did not provide courts with jurisdiction to grant broad injunctive relief, meant that Scott's 1979 conclusion that the Privacy Act allowed such injunctive relief was no longer good law. The FMA argued in response that when Scott made his decision he referenced a Ninth Circuit decision, *Cell Associates v. National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978), finding that broad injunctive relief was not authorized by the Privacy Act, but concluded otherwise, indicating that there was no subsequent change in the interpretation of the law that would provide the basis for dissolving the injunction.

Howard found that, even though Scott had referenced *Cell Associates*, there was no indication that he had relied on it in reaching his conclusion that the Privacy Act gave him jurisdiction to grant broad injunctive relief. Rather, Howard noted, "unchallenged, [Scott's] interpretation of the Privacy Act remedies remained valid until the *Edison* decision. In *Edison*, however, the Eleventh Circuit held for the first time that the equitable remedies available under the Privacy Act are limited to those specifically identified in the statute. Thus, while the Privacy Act did not change, the construction by the Court of Appeals of the remedies available under the Act did change, and changed in an important respect. This narrow construction, unequivocally prohibiting the type of injunctive relief granted in the FMA Injunction Order, constitutes a significant change in Privacy Act law."

Having concluded that there was an intervening change in the law, Howard next pointed out that "with respect to the 1979 FMA Injunction, the Eleventh Circuit's 1982 decisions in *Edison* and *Clarkson* effected a significant, substantive change in the law, affecting the rights and remedies available under the Privacy Act. Indeed, subsequent to these decisions, it is evident that the Privacy Act no longer authorizes any of the injunctive relief granted in the 1979 FMA Injunction, much less the permanent ongoing prospective relief at issue here. Thus, the obligation to forever withhold all such information 'has become impermissible under federal law.'"

Considering whether vacating the injunction was appropriate, Howard rejected the FMA's contention that the injunction could still be considered valid under the APA. Instead, she noted that "such far reaching [future] relief was not authorized under the APA at the time the 1979 FMA Injunction was entered nor is it appropriate now." She added that "the forward-reaching injunction enjoins an agency policy that no longer exists, and anticipates possible future agency action that may never come to pass. Such an injunction is impermissible under the Privacy Act and conflicts with the objectives of FOIA to encourage disclosure." Finally, she observed that dissolving the injunction would not bring about a drastic change in HHS's disclosure policy. She pointed out that "HHS represents that it has consistently maintained the position that the individually identifiable Medicare reimbursement data should not be released, based on Exemption 6 to FOIA. Thus, [vacating] the injunction will not result in an immediate release of the information at issue." (*Florida Medical Association, Inc. v. Department of Health, Education, & Welfare*, Civil Action No. 3:78-CV-178-J-34MCR, U.S. District Court for the Middle District of Florida, Jacksonville Division, May 31)

Views from the States…

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

California

The supreme court has ruled that the state collective bargaining law requires the County of Los Angeles to provide home address information to the Service Employees International Union local representing county employees and that the information, when released to the recognized union bargaining unit, does not violate the constitutional right of privacy. After the County declined to accept an amendment to its agreement with SEIU that would give SEIU access to home address information for purposes of contacting members of the bargaining unit, it challenged the policy before the Los Angeles County Employee Relations Commission. The Commission sided with the union. The County then challenged the decision in court. The trial court also found the union's right to the information outweighed individual privacy interests. At the Court of Appeal, the appellate court also upheld the union's right of access to the contact information, but added opt-out provisions for county employees who did not wish to share their contact information with the union. However, the supreme court, upholding the union's right of access, concluded the Court of Appeal had overstepped its authority by adding the opt-out procedures. After reviewing both federal and state labor law, the supreme court noted that "SEIU's request for home addresses and phone numbers of the County employees it represents called for presumptively relevant information. The burden was therefore on the County to prove that the contact information was not relevant or to supply adequate reasons why the information could not be supplied. Because the County failed to do so, its refusal to provide the information violated the duty to meet and confer in good faith." Acknowledging that there was an expectation of privacy in the employees' home

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address information, the court pointed out that "SEIU's interest in obtaining residential contact information for all employees it represents is both legitimate and important. . .[A] union elected as an exclusive bargaining agent owes a duty of fair representation to *all* employees in the bargaining unit it represents, including employees who are not union members." The court observed that "the invasion of nonmember employees' privacy. . .is also comparatively mild. Non-member employees may experience increased contact with the union by mail or other means, but there is no evidence SEIU has ever engaged in any harassment of a nonmember. If harassment is a concern employers may bargain for, or [the Employee Relations Commission] may adopt, procedures that allow nonmembers to opt out and prevent disclosure of their contact information." (*County of Los Angeles v. Los Angeles County Employee Relations Commission*, No. S191944, California Supreme Court, May 30)

Illinois

A court of appeals has ruled that the Department of Transportation violated the FOIA when it disclosed a "locked" version of an Excel spreadsheet concerning its Red Light Running Camera Enforcement System to Barnet Fagel. Although it admitted that it routinely used the unlocked version of the data, the Department justified restricting Fagel from analyzing the data through Excel by indicating that it was concerned about manipulation and misuse of the data. The trial court found that there was no basis for withholding the unlocked version and ordered the department to disclose it and pay Fagel $12,560 in attorney's fees. Upholding the trial court decision, the appeals court noted that "it is undisputed by the parties. . .that [the department] regularly maintained an unlocked version of the Excel spreadsheet in its ordinary course of business. Yet, [the department] provided a 'locked' version of the data. This flies in the face of the statute which requires that the data be provided 'in a format in which it is maintained' if it is not feasible to furnish it in the format specified by the requester. [The department] has not pled, nor does it appear to argue on appeal, that it was not feasible to provide Fagel with an electronic copy of the unlocked version of the Excel spreadsheet." Recognizing that there was a concern about manipulation or misuse of data, the court observed that "that is a concern which the legislature can address if it so chooses." The court added that "a fear of manipulation or misuse of the information is not an exemption under FOIA upon which [the department] could justify withholding the unlocked version of the Excel spreadsheet." (*Barnet Fagel v. Department of Transportation*, No. 1-12-1841, Illinois Appellate Court, First Division, May 28)

New York

A court of appeals has ruled that the personnel records of a former state trooper are protected by the exemption for personnel records use to evaluate performance. The court noted that "that Beardsley is no longer employed by [the State Police] has no bearing upon the question of whether the requested records were or were not used by [the State Police] to evaluate his performance. Likewise, the fact that Beardsley is a former officer of [the State Police] does not mean that there is no realistic possibility of abusive use of the records against him in litigation." Finding the trial court had improperly dismissed the case for failure to state a claim, the appellate court instead reinstated the case and directed that Beardsley be joined as a necessary party. The appeals court explained that "although no longer employed as a police officer by [the State Police], the record reflects that Beardsley is a defendant in a pending wrongful death civil lawsuit arising from the alleged hit-and-run incident. In light of these circumstances and given the cloak of confidentiality accorded to officers' personnel records. . ., his interests may be adversely affected by a judgment ordering disclosure of documents sought in this proceeding." (*In the Matter of Hearst Corporation v. New York State Police*, New York Supreme Court, Appellate Division, Third Department, May 30)

Ohio

A court of appeals has ruled that a follow-up call made by a 911 operator to a residence after the initial 911 call was disconnected, resulting in Michael Ray confessing to murder, remained part of the original 911 call and cannot be withheld under the investigatory records or trial preparation exemptions. Pointing out that the supreme court had previously ruled that 911 calls were non-exempt public records, the appeals court rejected Butler County's claims that the return call was protected as an investigatory record because it was initiated by the 911 operator who was working at the sheriff's office. The court observed that "the Outbound Call, while placed by [the 911 operator], constituted a continuation of the First Call so that [the 911 operator] could obtain additional information to provide an emergency response that was both effective and safe. When the [911 operator] place the Outbound Call, she had no idea that a crime had been committed, and had no investigatory intent beyond what was necessary to provide an effective emergency response." The County also argued that disclosure of the 911 call would be prejudicial to Ray's ability to get a fair trial. The court disagreed, noting that "there was no evidence submitted to the [trial court] as to why disclosure of the Outbound Call recording would endanger Ray's right to a fair trial. . .Prejudice cannot be assumed or presumed, simply because the Outbound Call recording includes admissions by Ray." (*State of Ohio ex rel. Cincinnati Enquirer v. Hon. Michael J. Sage*, No. CA2o12-06-122, Ohio Court of Appeals, Twelfth District, Butler County, June 3)

Tennessee

A court of appeals has ruled that the Rutherford County Regional Planning Commission provided adequate public notice of its meeting in which it discussed the proposed construction of a mosque by the Islamic Center of Murfreesboro by publishing its normal notice in the Murfreesboro Post. While the trial court had found the notice inadequate in light of the significant public interest in the proposed construction of the mosque, once the federal government filed suit against Rutherford County alleging the trial court's order violated the Religious Land Use and Institutionalized Persons Act of 2000, ICM's construction plan was approved and the mosque was built. As a result, the appellate court noted that most of the substantive issues from the trial court's decision were now moot, but that the issue of whether or not the notice was adequate was not moot. Because ICM's project was to be built on its own property, the plan required no rezoning but did require submission of a construction plan. As a result, the planning commission scheduled consideration of the plan for its bi-monthly morning meeting. It published notice in the Murfreesboro Post, which was its normal choice of publication, said little beyond the fact that the commission was holding a public meeting. The trial court found the notice was inadequate, particularly in light of the public interest in the proposed construction of the mosque. The court pointed out that the Open Meetings Act "requires notice of the meeting itself and does not speak to notice of the content of the meeting. Cases requiring notice of items to be discussed at a meeting have all involved special meetings. We decline to adopt the trial court's reasoning that issues of public importance require notice of meeting content, even for regular meetings." Turning to whether publication in the Murfreesboro Post was adequate, the court indicated that "the newspaper was published weekly, was intended for circulation to the general public, and contained matters of general interest. Over 21,000 copies were distributed throughout the county on Sundays in May 2010. This was the customary location for the county planning commission's notices, and any interested person could obtain a copy at a distribution rack or on the newspaper's website. We conclude that the county's publication of the notice in the Murfreesboro Post was sufficient under the [Open Meetings Act]." (*Kevin Fisher v. Rutherford County Regional Planning Commission*, No. M2012-01397-COA-R3-CV, Tennessee Court of Appeals, May 29)

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Texas

A court of appeals has ruled that a protective order issued in a lawsuit filed by ICON Benefit Administrators against employees of the City of Lubbock alleging they made defamatory statements about ICON's administration of the City's health care plan covering the protected materials and any records derived from the materials is broad enough to encompass the results of an independent audit for the City of ICON's administrative services. Although the defamatory statements lawsuit was settled, the parties agreed the City could use the audit subject to a substantially identical protective order. The City received several open records requests for the audit and ICON asked the judge in the dismissed suit to enforce the protective order. The judge found the protective order did not cover the audit and ICON appealed. The appeals court pointed out that "the order on its face prohibits public disclosure not only of protected materials but also any knowledge or intelligence taken from or received by those protected materials. It is undisputed that the audit was created using and analyzing protected materials. . .Because the audit is based on the analysis of protected materials and disclosed information from protected materials, the audit is information derived from protected materials and the unambiguous terms of the protective order prohibit its disclosure to the public. . .[A]ny evidence that the audit was not wholly derived from ICON's protected material and did not disclose any protected material, confidential or proprietary information, is irrelevant." (*ICON Benefit Administrators II, L.P. v. Joella Mullin, et al.*, No. 05-11-00935-CV, Texas Court of Appeals, Dallas, June 5)

Washington

A court of appeals has ruled that the Department of Licensing violated the Public Records Act by failing to respond to prisoner Derek Gronquist's request for the business license application of "Maureen's House Cleaning" within five business days and by failing to show that redacted personal information was exempt. After the trial court upheld Licensing's claims, Gronquist appealed. The appeals court found Licensing had violated the PRA, but indicated that since the business licensing function had been transferred to the Department of Revenue in 2011 most of the personal information was now statutorily exempt. The appeals court noted that "under the confidentiality statutes cited by Licensing, the information redacted in the application was largely not exempt. Thus, Gronquist should have been the prevailing party at the trial court and, as such, may be entitled to costs and penalties. But under Revenue's current confidentiality statute pertaining to license applications, the information cannot be disclosed. We will not order Revenue to do what it is now prohibited to do under [the relevant statute]." Discussing the time frame of potential penalties, the court observed that "the PRA authorizes penalties for 'each day the requester is unable to inspect or copy a nonexempt record.' Here, although the redacted information may have been 'nonexempt' at the time of Gronquist's PRA request, the information is now exempt from disclosure. Gronquist will not now be able to 'inspect' the record, thus, the penalty period, if any, ends no later than July 1, 2011, the date [the Revenue withholding provision] became effective and the date the information became exempt from disclosure." (*Derek E. Gronquist v. Washington State Department of Licensing*, No. 41897-5-II, Washington Court of Appeals, Division 2, June 4)

The Federal Courts…

If anyone still believed that courts would perform independent oversight of agency classification decisions, that belief was finally put to rest when the D.C. Circuit ruled in no uncertain terms that the U.S. Trade Representative had provided sufficient reasons for withholding a white paper containing the U.S. interpretation of the phrase "in like circumstances" for use in negotiations on a Free Trade Agreement of the Americas, even though District Court Judge Richard Roberts had twice rejected the agency's classification

explanation as inadequate under the Executive Order on Classification. Citing remarks by George Washington to the effect that foreign negotiations often depended on secrecy, Senior Circuit Court Judge A. Raymond Randolph pointed out that "whether—or to what extent—reduced flexibility might affect the ability of the United States to negotiate future trade agreements is not for us to speculate. The government has determined that it would 'damage [the] ability of the United States to conclude future trade agreements on favorable terms.' That determination has the force of history behind it. . .Courts are 'in an extremely poor position to second-guess' the Trade Representative's predictive judgment in these matters, but that is just what the district court did in rejecting the agency's justification for withholding the white paper." Continuing, he noted that "the question is not whether the court agrees in full with the Trade Representative's evaluation of the expected harm to foreign relations. Rather, the question is 'whether on the whole record the agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility.' We conclude that it does." The white paper was more than a decade old and the Trade Representative admitted that it no longer represented the U.S. position. As a result, the district court had rejected the Trade Representative's contention that international arbitrators might view the white paper as reflecting U.S. policy to the detriment of the U.S. The district court found that argument too speculative, but Randolph observed that "we do not see why, in the absence of a definition in the governing agreement, it is so implausible that an arbitrator would look to the white paper as evidence of the United States' interpretation of the phrase—even if that document is not binding on the United States." The district court had also found that since the free trade negotiations had continued over several administrations the disclosure of a former interpretation would not be considered to reflect the current U.S. negotiating posture. Randolph dismissed that distinction as irrelevant. He noted that "we do not know the expectations of foreign governments or the positions future U.S. administrations will support. But we do know that disclosure of the white paper would reveal a position taken by the United States in the past. It seems perfectly reasonable to think that could limit the flexibility of U.S. negotiators." (*Center for International Environmental Law v. Office of the United States Trade Representative*, No. 12-5136, U.S. Court of Appeals for the District of Columbia Circuit, June 7)

A federal court in Louisiana has ruled that the FBI properly withheld records concerning whether Brandon Darby was a confidential informant and that Malik Rahim **failed to exhaust administrative remedies** for his request concerning Common Ground Relief, formed to provide short-term relief after Hurricane Katrina and long-term support in rebuilding Gulf Coast communities. Darby worked with CGR from 2005 to 2008. In December 2008, Darby wrote a letter posted on the Internet indicating that he had served as an informant for the FBI. In January 2009, Darby testified as a government witness in the domestic terrorism trial of David McKay on charges of disrupting the 2008 Republican Convention in St. Paul, Minnesota, and confirmed that he had been an FBI informant since November 2007. This prompted Rahim to request FBI records about CGR, particularly any records confirming Darby's role as an informant. The FBI responded that it would neither confirm nor deny that it had records on Darby without a Privacy Act waiver. Rahim submitted an "amended" FOIA request for the same records about himself, CGR and Darby, and at the same time appealed the agency's *Glomar* response on Darby to OIP, arguing that Darby's status as an informant had been publicly confirmed when he testified at McKay's trial. OIP denied the appeal. Two months later, the FBI sent Rahim 25 redacted pages pertaining to himself and CGR. Rahim did not appeal that response and instead filed suit. The agency argued Rahim had failed to exhaust his administrative remedies because he had not appealed the agency's records response. Rahim claimed his appeal concerning Darby's records qualified as an appeal of the entire request. Siding with the agency, the court noted that "nothing in Plaintiff's July 30, 2009 letter to OIP indicated he sought review of any aspect of the FBI's decision other than 'as it pertained to Brandon Darby.' The Court finds Plaintiff has failed to exhaust his administrative remedies regarding records pertaining to himself and CGR." Turning to the status of Darby's records, Rahim contended that his confirmation as an FBI informant suggested that his privacy interests were outweighed by the public

interest in disclosure. Accepting that Darby had been officially confirmed as an informant, the court indicated nevertheless that his status was not relevant in this case. The court explained that "Darby has never made statements indicating he served as an FBI informant for any investigation involving Plaintiff or CGR. . .As a result, Darby's statements regarding the *McKay* case do not diminish his privacy interests in records, if any exist, that are responsive to Plaintiff's FOIA request as to Plaintiff and the organization." Finding Rahim had not shown any public interest in disclosure of Darby's records, the court noted that "in essence, Plaintiff alleges that the FBI acted improperly by having Darby infiltrate the organization in order to 'disrupt' CGR's activities in New Orleans following Katrina. However, Plaintiff has not provided the Court with any *evidence* to support his allegations that the FBI engaged in any sort of impropriety. Without evidence that would lead a reasonable person to believe some sort of government impropriety might have occurred, Plaintiff cannot show that the public interest sought to be advanced is a significant one or that the information sought is likely to advance that interest." Rahim also argued that the informant exclusion contained at 552(c)(2), allowing a law enforcement agency to exclude records about an informant unless that informant's status had been officially confirmed, did not apply because Darby's status had not been officially confirmed. The court indicated that "Plaintiff has not come forward with any evidence indicating that Darby's status has been officially confirmed as an FBI informant for an investigation of *Plaintiff and CGR*. . .Any purported confirmation of Darby's status as an informant as to the *McKay* case is of no moment as to this case." (*Malik Rahim v. Federal Bureau of Investigation*, Civil Action No. 11-2850, U.S. District Court for the Eastern District of Louisiana, May 31)

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