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## In this Issue



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*Washington Focus: The Director of National Intelligence has issued a revised Classified Information Nondisclosure Agreement. Steve Aftergood in Secrecy News notes that there are a few updates mainly as a result of recently enacted statutes such as the 2012 Whistleblower Protection Enhancement Act. But to Aftergood, what is particularly noteworthy is that "for the first time the new Nondisclosure Agreement was issued by the Director of National Intelligence rather than the Information Security Oversight Office, as in the past." Aftergood points out that "the DNI is responsible for security policy not only in the Intelligence Community but across the executive branch." And, Aftergood observes, "Effective immediately, all personnel who are cleared for access to classified information will be expected to sign the DNI-prescribed non-disclosure form even if their work is unrelated to intelligence."*

## Court Restricts Scope of CIA Exemption 3 Statute

In her time so far on the bench, Judge Beryl Howell has expressed her willingness to take on a range of complicated FOIA issues and, regardless of whether one agrees or disagrees with her legal conclusions, to consider and analyze them thoroughly. Such detaled analysis has led to some extraordinarily lengthy opinions, including her most recent 163-page ruling in a case brought by National Security Counselors against several agencies, primarily the CIA, concerning the way FOIA requests are processed. While finding fault with a number of agency practices, her conclusion that the CIA routinely claims that the coverage of Section 6 of the CIA Act, 50 § 403g, long-recognized as an Exemption 3 statute, is considerably broader than can be supported by the statutory language places significant restrictions on one of the agency's primary non-disclosure provisions. Section 6 exempts "the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA."

ACCESS REPORTS

After reviewing the D.C. Circuit's opinions dealing with the coverage of §403, Howell observed that "the thrust of these cases is that § 403, standing alone, only protects 'information on the CIA's personnel and internal structure,' such as the names of personnel, the titles and salaries of personnel, or how personnel are organized within the CIA." Indicating that "the CIA's proposed construction of § 403g's scope is too broad," Howell noted that "the CIA would have § 403g exempt from disclosure all 'information about the [CIA's] functions.'" She explained that "the CIA relies heavily on the malleable terms 'functions' and 'organization' in §403g to expand the provision's scope, and it is true that those are the two terms used in § 403g with potentially the broadest sweep. Nevertheless, the plain text of the statute limits protection from disclosure only to the functions and organization pertaining to or about personnel, not to all information that *relates* to such functions and organization."

The CIA argued that since the agency acted through its personnel, there was no practical difference between the organization and functions of its personnel and the agency itself. But Howell pointed out that this argument ran directly contrary to the Supreme Court's ruling in *Milner v. Dept of Navy* finding that the term personnel rule meant a rule *for* personnel, not *about* personnel. She noted that "Congress did not intend § 403g to exempt all information *for* personnel, but only information *about* personnel, *i.e.*, their 'organization, functions, names, official titles, salaries or numbers.' Therefore, just because a piece of information relates to or concerns something CIA personnel do in carrying out their government responsibilities does not mean it is exempt from disclosure under § 403g."

Having narrowed the provision's coverage, Howell next concluded that records about FOIA processing were not covered by § 403g. She then examined whether or not information about how the agency's information management practices still qualified under the provision. She noted that "shorn of the gratuitous addition of the words 'internal' and 'organizational,' it appears that the information referred to in these categories is information about how the CIA manages, stores, and retrieves information. . .It is undoubtedly true that managing, storing, and retrieving information is a function of some, if not all, CIA personnel, but the CIA is attempting to augment the scope of § 403g by withholding information that merely *relates to* or *concerns* that function. The language of the statute simply does not support such a broad reading." She added that "the CIA may not invoke § 403g to withhold information merely because that information may be used by CIA personnel to carry out their responsibilities or functions." She rejected NSC's invitation to find the agency was in bad faith. Instead, she observed that "it is highly unlikely that the CIA was or could be acting in 'bad faith' regarding its interpretation of § 403g—a finding that would require a showing that the CIA invoked this statute to withhold information while being aware of (and choosing to ignore) a definitive interpretation of that statute's scope."

The CIA had refused to respond to several NSC requests because they required the agency to query its database in unique ways to get information about such issues as categories of requesters and most frequent requesters. Although Howell had a considerable amount of sympathy with the desire to use agency databases to compile information for requesters, she indicated that "permitting a member of the public to request from an agency a listing of search results or a listing that summarizes or describes the contents of an electronic database would permit the public to requisition the resources of governmental agencies in a way that the FOIA did not intent. The FOIA was intended to provide access to records held by federal agencies, nothing more. The FOIA was *not* intended to provide access to the mechanisms that agencies use to retrieve or aggregate information." She explained that "these individual pieces of information—for example, the data points that populate a given field of a database—are records under the FOIA." But she noted that "when those individual data points are uniquely arrayed—for example, when a query returns a list of search results—that unique array (or 'aggregation') of individual data points constitutes a distinct record. It is a distinct record because the particular arrangement of data conveys a unique set of information—information that is distinct from what the individual data points can convey when they are arranged differently or when they are not arranged in any

particular way at all. Thus, unless the agency has 'chosen to create and retain' this unique aggregation or arrangement of data points, the product of such an aggregation or arrangement of data involves the creation of a new record."

NSC claimed that both the CIA and the State Department had improperly refused to provide records in electronic formats. Both agencies explained to Howell that they maintained both classified and unclassified computer systems and because requests were processed on the classified system it was impossible to provide disclosable records in electronic format. Howell indicated that the CIA claimed at one point that it did not transfer documents from its unclassified system to its classified system, but in another declaration it said records responsive to FOIA requests were "scanned and uploaded to the classified system. Because of these inconsistent statements, she found the agency had so far failed to explain why it could not disclose records in electronic format. On the other hand, the State Department provided an elaborate explanation of how records were processed on its classified system which contained the required redaction tools. To then transfer reviewed records to the unclassified system would take a number of further steps, including a second line-by-line review, that the agency claimed would be unduly burdensome. But Howell noted that "other than this second redundant line-by-line review of documents, none of the additional steps required to produce documents in electronic format appear unduly burdensome." Finding the agency had not shown that the records were not "readily reproducible," Howell ordered State to either provide a supplemental justification or to release documents to NSC in electronic format. (*National Security Counselors v. Central Intelligence Agency*, No. 11-443, No. 11-444, and No. 11-445 (BAH), U.S. District Court for the District of Columbia, Aug. 15)

# Views from the States…

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

## California

A court of appeals has ruled that the port agent for the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun is a public official subject to the California Public Records Act when performing statutory and administrative duties for the Board, but that records of pilot assignments maintained in his role as president of the private San Francisco Bay Pilots do not qualify as agency records. The Pacific Merchant Shipping Association filed several CPRA requests with the Board and with Captain Bruce Horton, president of the Bay Pilots and the designated port agent for the Board of Pilot Commissioners, requesting information about pilot assignments. The Board told PMSA that it did not maintain such a record. Horton responded to PMSA by indicating that he did not maintain such a record as the port agent, but that Bay Pilots maintained a database that included pilot assignment information. However, he indicated that neither he nor any former port agent had ever used the information in performing their Board duties. Responding to PSMA's requests as counsel for the Board, the Attorney General contended that the Board had no pilot assignment records and that any records maintained by Bay Pilots were private and not under the control of the Board. PSMA sued and the trial court concluded that the Board was subject to the CPRA and that the records were under the legal control of the Board through its port agent. The appeals court agreed that the port agent was subject to the CPRA. The court noted that in federal liability litigation concerning an oil tanker that ran into the San Francisco-Oakland Bridge the port agent had taken the position that it was immune from liability because he was a state official. Although the Board contended that to apply the federal holding under these

ACCESS REPORTS

circumstances would be inequitable, the appeals court pointed out that "we fail to appreciate the inequity in refusing to allow the Port Agent to take an inconsistent position here. The Port Agent fails to explain why one should be permitted to assume the cloak of a state official when it provides protection, but to then cast it off in the event it becomes burdensome." Turning to the records issue, the court arrived at a different conclusion. The court observed that "the fact that the Port Agent may act as a public officer in the performance of certain of his duties does not mean that every record in his possession or control thereby becomes a public document subject to the CPRA. . .[T]he Port Agent has both private and public incarnations. Bar Pilots is an independent association, with its own facilities and its own records of its operations, and the Port Agent concurrently serves as president of that association. There is no contention that Bar Pilots is a public agency, or that its internal private records are subject to the CPRA. . ." Finding that the record did not support a conclusion that the Bay Pilot database was subject to the CPRA, the court further rejected the argument that the records were under the constructive control of the Board. The court noted that "the evidentiary record before us does not support a finding that the Pilot Log data is, or ever has been, used by the Port Agent in the performance of his official duty in assignment of bar pilots, and consequently a public record. If the data itself is not a public record, the fact that the Board could theoretically request it from Bar Pilots does not make it so." Dismissing PMSA's public interest argument, the court observed that "we do not doubt that historic records reflecting individual exemptions from what are now only recommended [procedures] in piloting assignments may 'shed light on the process of assigning pilots to vessels,' as PMSA contends. But records otherwise private do not become public simply by virtue of public interest in their content." (*Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun v. Superior Court of the City and County of San Francisco; Pacific Merchant Shipping Association, Real Party in Interest*, No. A136803 and A 136806, California Court of Appeal, First District, Division 5, Aug. 1)

## Connecticut

The court of appeals has ruled that federal law limiting the dissemination of criminal data contained in the federal NCIC database does not supersede state law but instead is consistent with state law in protecting such information from disclosure under the state FOIA. The case involved requests from two reporters for the printout of the results of an NCIC search conducted during the investigation of a suicide at the Foxwoods Resort Casino. The Department of Public Safety denied the request based on the compact between the state and the federal government restricting the use of such information. The reporters complained to the FOI Commission, arguing that the compact was essentially a contract between the state and the federal government that impermissibly allowed the Department to "contract out" its obligations under FOIA. The FOI Commission agreed and the Department sued. The trial court sided with the FOI Commission. But the appeals court reversed. Relying primarily on the U.S. Supreme Court's decision in *Reporters Committee*, the appeals court pointed out that "rather than preempting state law, the federal law is consistent with state law in this case. . .[T]he limitations federal law places on disclosure of NCIC 'rap sheet' data are mirrored by state law." While the FOI Commission acknowledged that the U.S. Attorney General had the right to control and limit access to the federal records, it concluded that once the record was provided to and used by the Department, it became a state record and the compact did not relieve the Department from its FOIA obligations. The appeals court noted, however, that the agreement to did not constitute contracting out the Department's FOIA obligations. Instead, it pointed out that the criminal history data-sharing agreement was a "national compact, authorized by Congress and entered into by the General Assembly, which is codified by the state and by the federal government. Accordingly, in the present case, the state is not 'contracting away' its obligations under the act, but, rather, legislatively entered into a compact to participate in a federal program, which places limitations on the disclosure of NCIC printouts." The court added that "when the state accesses the NCIC database, its use of the NCIC records does not change the terms of the compact. The dissemination of NCIC printouts is governed by the compact and the NCIC printouts in this case are exempt from

disclosure." (*Commissioner of Public Safety v. Freedom of Information Commission*, No. 32381, Connecticut Appellate Court, Aug. 13)

A trial court has ruled that the Planning and Zoning Commission of the Town of Monroe improperly went into executive session based on exceptions for discussion of pending litigation, but that a related exception for discussions of measures short of legal action authorized the closed session. The trial court previously found the Planning and Zoning Commission improperly denied a special permit to Handsome, Inc. and sent the case back for further proceedings. This time around the FOI Commission found the Planning and Zoning Commission's closed session discussion pertaining to the implications of the court's ruling was improper. Agreeing with the FOI Commission's interpretation on the pending litigation exception, the court indicated that the Planning and Zoning Commission argued that "the section means that a pending claim or pending litigation arises when an agency receives a demand for 'legal relief' *or* 'which asserts a legal right' with the clause requiring the institution of an action only modifying 'legal right.' The FOIC, to the contrary, argues that the legal relief or legal right facing the agency must be accompanied by an intention to institute an action. The findings of the FOIC show that Handsome never made a threat of litigation." The court observed that "the [Planning and Zoning Commission] has focused on the wrong 'or' in these statutory provisions. The sections require the threat of litigation 'if such relief *or* right is not granted.' Were the [Planning and Zoning Commission's] interpretation to be correct, the ending clause should read: 'if such right is not granted by the agency.' To the contrary, the FOIA requires both the notice to the agency demanding legal relief or asserting a legal right *and* states the intention to commence a legal action." But the court found the exception for consideration of action covered the closed session. "The commission argues that 'action' in the definition of 'pending litigation' should mean 'legal action.' We disagree. The definition of 'pending litigation' [in (A) and (B) of the exception, refer to litigation in terms of legal action. Subsection (C)], however, refers to 'consideration of action to enforce or implement legal relief or a legal right.' Absent from that subdivision are the terms 'legal action' and 'an action'. . .Such a reading of the statute yields the interpretation that any action, not restricted to legal action, to implement legal relief or enforce a legal right concerns 'pending litigation' under the exception." (*Planning and Zoning Commission of the Town of Monroe v. Freedom of Information Commission*, No. CV 126015308S, Connecticut Superior Court, Judicial District of New Britain, Aug. 13)

## Hawaii

The supreme court has ruled that the Maui County Council violated the Sunshine Law when various members circulated memoranda to other council members that were not made public concerning amendments to bills pertaining to a large development project. Further, although the supreme court concluded that the Land Use Committee's multiple continuances of a meeting did not technically violate the Sunshine Law, it made clear that such a practice violated the intent of the law to make government actions as public as possible. Finally, the court found that the council's final action on the bills was not subject to being voided because the plaintiffs had asked that the initial first reading of the bills be voided, rather than the final second reading. The case involved a contentious development project in Maui. The Land Use Committee meeting was scheduled for October 18, 2007, but was continued and reconvened 12 times without any further public notice aside from an announcement at the end of each continuance. When the bills were considered by the Maui County Council in February 2008, a number of council members privately circulated memoranda to the rest of the council members concerning various amendments and asking members to favorably consider such amendments. After the council adopted the bills, several plaintiffs sued claiming that the continuances of the LUC meeting in 2007 violated the restriction on continuances, the requirement to allow public testimony, and the public notice requirement. The plaintiffs also contended that the council had improperly relied on members' memoranda in making its decision. The trial court ruled in favor of the County, finding that the continuances were appropriate based on the need for the LUC to work around other commitments of its

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members and that the memoranda were only informational. The appeals court agreed, although a concurring judge found that, while the memoranda were improperly considered by the council, the plaintiffs had failed to challenge the county's final action. The supreme court agreed that language in the Sunshine Law suggesting that a public body could only continue discussion of an important matter once was clearly more flexible than the plaintiffs claimed. The court indicated that "the legislative history of the Sunshine Law reflects a concern for balancing public access to board meetings with the board's continued ability to effectively conduct its business. This concern is exemplified in the public testimony provision, which expressly grants boards discretion to reasonably administer the oral testimony requirement. [Likewise], the House report considered that it was unreasonable to require boards to decide on matters of reasonably major importance at a single meeting. There is no suggestion that the legislature intended for boards to be limited to a single continuance." However, the court noted that such actions potentially violated the spirit of the statute. The LUC had provided notice of continuances at the end of each continued session and posted no written notices. The court indicated that "the legislature's concern with respect to the Sunshine Law has always been that the public should have a realistic, actual opportunity to participate in the board's processes rather than a theoretical 'right' to participate in name only." The court observed that "while a continued meeting does not require a board to post a new agenda, nevertheless the means chosen to notify the public of the continued meeting must be sufficient to ensure that meetings are conducted 'as openly as possible' and in a manner that 'protects the people's right to know.'" Turning to the council members' memoranda, the court pointed out that "the solicitation of votes clearly places the challenged memoranda outside the purview of the permitted interaction [exception]. As such the challenged memoranda violated the Sunshine Law." Noting that the statute's goal was to open government to public scrutiny, the court observed that "the MCC violated the Sunshine Law by circulating written justifications of their proposed actions, effectively limiting public scrutiny of the MCC's rationale for passing the [bills] and the factors that ultimately led to the MCC's decision." The court then concluded that the plaintiffs had failed to challenge the County's final action. The court pointed out that "we define 'final action' for the limited purpose of determining that a complaint seeking invalidation was not filed within ninety days of a 'final action' as required by [statute]. We do not define 'final action' for the purpose of defining what constitutes a *violation* of the Sunshine Law." The court observed that "to limit the [voidability] remedy in a manner that divorces the board's deliberation process from its final action would be contrary to the declaration of policy and intent in [the statute]." (*Daniel Kanahele, et. al v. Maui County Council*, No. SCWC-29649, Hawaii Supreme Court, Aug. 8)

## Illinois

A court of appeals has ruled that the University of Illinois Springfield properly withheld information concerning the termination of two coaches of the women's softball team for sexual misconduct as well as the unexplained resignation of the woman's golf coach under the exemptions covering the deliberative process privilege and personal privacy. But the court also concluded that three records not covered by the two exemptions were not protected from disclosure by the federal Family Educational Rights and Privacy Act. Bruce Rushton, a reporter for the *State Journal-Register*, requested information about the incidents. The university disclosed information pertaining to the terminations as well as evidence of a $200,000 settlement for a member of the woman's softball team, but denied large portions of the records. The trial court sided with the university. The appeals court found several documents describing staff opinions of the investigation were privileged. It also agreed that a letter from the victim's attorney was privileged as well, noting that "the remaining undisclosed portion outlines the opinion of the victim and her attorney regarding how they wish to proceed with resolving the victim's potential legal claims against UIS. This information would have undoubtedly been relied upon by UIS in formulating a plan or policy for settling potential litigation with the victim." The court rejected the university's claim that witness statements were privileged. The court observed that "these documents, which contain factual accountings of the events by witnesses, are capable of standing alone, with no evidence that they are 'inextricably intertwined' with the predecisional process." The *Journal-*

*Register* argued that the public interest in disclosing the information about the incident outweighed any privacy considerations. The court, however, disagreed. It pointed out that "the details of [the] sexual misconduct are highly personal, which weighs heavily in favor of exemption. The same cannot be said for the actions and behaviors of the coaches preceding the sexual misconduct, which does not affect the personal privacy rights of the students, but instead reflects on the decisions of UIS and its coaches." The court added that the newspaper had alternative means to obtain the identities of the victims by obtaining a roster of the 2009 women's teams and asking members for information. After reviewing the remaining three documents, the court concluded that none of them qualified as student records under FERPA. (*State Journal-Register v. University of Illinois Springfield*, No. 4-12-0881, Illinois Appellate Court, Fourth District, Aug. 8)

## Kentucky

The Attorney General has found the Hardin County School District violated the Open Records Act when it withheld its investigatory file on Highland Elementary School principal Mark Thomas after Thomas resigned before any further action by the District. Reporter Renee Murphy requested the records as soon as Thomas was suspended pending an investigation into allegations of wrongdoing. At that time, the District told Murphy that the investigation had just begun and that any records would be withheld until the investigation concluded. Thomas resigned, but the District continued to withhold the records, arguing they were still preliminary and that, alternatively, Thomas' attorney had threatened to sue the District if it disclosed the records. The Attorney General noted prior case law held that an employee's resignation constituted final action for purposes of the investigatory files exemption. As to the threat of legal action by Thomas, the AG pointed out that such a threat "though clearly unfortunate and even more clearly unwelcomed, does not constitute a legal basis for denying Ms. Murphy's request." The AG indicated that the supreme court had recognized a right of action by anyone affected by the disclosure of information, providing someone like Thomas the right to sue to block disclosure. But the AG concluded that such a threat did not relieve the District from its obligation to disclose the records. The AG concluded that "we see little likelihood that the Hardin County School District can avoid litigation. . .However, these issues are resolved by the court, we remind the district that judicial enforcement of the public's right to know is contemplated by the Act when administrative enforcement cannot secure that right." (13-ORD-121, Office of the Attorney General, Commonwealth of Kentucky, Aug. 2)

## Louisiana

A court of appeals has upheld the trial court's decision to award Berry Chandler $17,000 in attorney's fees for his suit against the Ouachita Parish Sheriff's Office to obtain a log of 19 phone calls made to the sheriff's office by Tanya Coie pertaining to harassing calls allegedly made to her. The sheriff's office contended that because the phone logs were mistakenly uploaded to the wrong computer they were subsequently destroyed. While the trial court found that the sheriff had not acted arbitrarily or capriciously, it also found that the office had failed to provide the required certification of the reasons why the records were not available. Subsequently, Chandler asked for $35,000 in attorney's fees and the court cut that amount in half. The sheriff's office appealed the award as did Chandler, who argued he deserved a larger award. The appeals court noted that "the trial court determined that the OPSO failed to provide the certification required [by statute] as to the absent recording of the 19 calls and the subpoena return." But having found that, the court indicated that "the OPSO did not produce the requested records at issue because they no longer existed when Chandler made his requests. The OPSO could not unreasonably or arbitrarily fail to respond to Chandler's requests as required [by the access statute] when it no longer had the recorded calls or subpoena returns." Approving of the award to Chandler, the court noted that "a member of the public should not have to file a suit to obtain access to a public record or information on what happened to records that should have been preserved by the custodian." The court indicated that "having reviewed this record and the billing records

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submitted by Chandler, we find no abuse of discretion by the trial court in awarding $17,000 in attorney's fees." (*Berry Chandler v. Ouachita Parish Sheriff's Office*, No. 48,179-CA and No. 48,403-CA, Louisiana Court of Appeal, Second Circuit, Aug. 7)

## Minnesota

A court of appeals has ruled that Minnesota State Colleges & Universities must disclose faculty syllabi pursuant to the Data Practices Act to the National Council on Teacher Quality to use for research purposes because since the organization acknowledged it would use the information solely for research purposes its disclosure would constitute a fair use under the Copyright Act. The Council requested the information from MnSCU, which told the Council it would allow the Council to see the syllabi but not copy them because to provide copies would expose them to potential liability under the Copyright Act. The Council responded by indicating that it planned to use the syllabi for research purposes only which would constitute a fair use under the Copyright Act. When MnSCU declined to provide the records, the Council sued. The trial court found that the Council's proposed use of the syllabi constituted a fair use creating an exception to any copyright infringement. The appeals court indicated that "the [trial] court considered the undisputed facts and held that NCTQ's proposed use is 'fair use,' and MnSCU does not contest this holding on appeal. . .The uncontested, stated purpose of the NCTQ therefore mirror the qualifications for the copyright act's fair-use exception for 'criticism, comment. . .scholarship , or research.'" The MNSCU argued that the Data Practices Act barred it from making a fair-use determination when accessing a request for data. The court noted that "MnSCU is correct that the Data Practices Act does prohibit MnSCU from *requiring* a data requestor to justify its access request. But the Act does not expressly or implicitly prohibit an agency from considering a justification that the requestor has provided voluntarily. Although MnSCU did not request a fair-use justification, the NCTQ volunteered one anyway when it replied to MnSCU's stated copyright-infringement concerns. These circumstances provide safe footing between the data-access mandate embodied in the Data Practices Act and the fair-use-only provisions embodied in the Copyright Act. And this footing allows for a non-conflicting interpretation and application of federal and state law; although state law prohibits a data-practices respondent from demanding a fair-use justification, it does not prohibit it from recognizing that one exists. And at least when that justification is validated by a court's unchallenged legal assessment that the third-party use *will* constitute fair use, as has happened in this case, a government agency cannot refuse to provide the requested data relying only on its hypothetical concern that the third-party use might *not* constitute fair use." (*National Council on Teacher Quality v. Minnesota State Colleges & Universities*, No. A12-2031, Minnesota Court of Appeals, Aug. 5)

## Pennsylvania

A court of appeals has ruled that an agency does not waive its right to claim exemptions when a request is deemed denied because the agency did not respond within the five-day time limit. Robert McClintock filed four requests with the Coatesville Area School District concerning Graystone Academy Charter School. The District did not respond within the statutory five days and McClintock filed four appeals with the Office of Open Records, arguing that the District had waived any exemption claims. Citing the recent supreme court decision, *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (2013), OOR determined the District had not waived its exemption claims because it "did not *alter* its grounds for denial, but instead 'set forth grounds during the appeal that the Requester had the opportunity to address.'" OOR then ordered the disclosure of some, but not all, the records requested. The trial court upheld OOR's decision. The appellate court found that *Levy* was controlling. It noted that "the reasoning in *Levy* applies with as much force where an open records officer fails to list a reason for non-disclosure on the agency's initial written denial as when it fails to provide a written denial at all for non-disclosure. . .The General Assembly specified that failure to respond to a [Right to Know Law] request would result in a deemed denial of the request; it did not also sanction that

failure with the waiver of otherwise legitimate reasons for non-disclosure." One judge dissented, noting that a deemed denial was tantamount to a waiver of an agency's right to invoke discretionary exemptions. The judge pointed out that "unlike the situation in *Levy*, where an agency had provided a response but sought to amend, holding that an agency can raise objections for the first time on appeal to the OOR, renders numerous sections of the RTKL meaningless and allows the agency to manipulate requesters." (*Robert T. McClintock v. Coatesville Area School District*, No. 1262 C.D. 2012, Pennsylvania Commonwealth Court, Aug. 9)

### Texas

A court of appeals has ruled that disclosure of board meeting minutes, which are required to be made public under the Open Meetings Act, cannot be limited by exemptions in the Public Information Act. Larry York requested board minutes for the Texas Guaranteed Student Loan Corporation as well as a Voluntary Flexible Agreement filed by the Corporation with the federal Department of Education seeking more flexibility in developing programs and techniques aimed at helping borrowers avoid student-loan default. TGSL asked the Attorney General for permission to withhold some documents, claiming that some attachments to board minutes were protected by exemptions in the PIA for records whose disclosure would cause competitive harm. The Attorney General concluded that TGSL was required to disclose almost all the requested records with the exception of pricing information contained in its VFA. TGSL then filed suit against the Attorney General and York intervened. The trial court found that TGSL could withhold the pricing information as well as information attached to board minutes. At the appellate court, TGSL argued that the relevant PIA exemptions applied to the board minutes. The court disagreed, noting that the PIA exemptions "are explicitly addressed solely to the right of public access created by [the] PIA. . .They do not. . .purport to operate more generally against public-access or disclosure requirements created or imposed by other law. Consequently, these exceptions would not operate against the OMA's requirement that open-meeting 'minutes' be made available upon request." TGSL then argued that the attachments to minutes were not actually minutes as defined in the OMA. But the court pointed out that "although the OMA specifies minimum information that 'minutes' must convey about an open meeting, it does not purport to define that term. . .[W]e look to the ordinary meaning of 'minutes,' or, alternatively, to a technical meaning the term has acquired, and from either standpoint 'minutes' simply refer to the record or notes of a meeting or proceeding, whatever they might contain. . .Nothing in these definitions of 'minutes' imply any sort of limitation on the information about the proceedings that a body might choose to include in the minutes." The court then agreed with TGSL that the pricing information contained in its VPA was protected under the PIA. The court observed that "TGSL's evidence also established that the corporation would be harmed in its negotiating process if the pricing information becomes public because, until the DOE awards the contracts, TGSL and presumably its competitors are free to vary previously submitted proposals and negotiate terms and conditions." York had also asked for attorney's fees. The court, however, indicated that although York now claimed he was representing an anonymous client, "it remains that he, not the client, was the 'requestor' under the PIA. Consequently, York, not the unidentified client, was the person with standing to intervene in TGSL's suit and thereby become a 'defendant' who could potentially recover attorney's fees. And because York cannot 'incur' attorney's fees as a matter of law where he has acted pro se, the [trial] court properly granted TGSL's summary-judgment motion against that claim." (*Larry F. York v. Texas Guaranteed Student Loan Corporation*, No. 03-12-00309-CV, Texas Court of Appeals, Austin, Aug. 8)

## The Federal Courts…

Judge Royce Lamberth has ruled that Landmark Legal Foundation is entitled to conduct **discovery** in its FOIA suit against EPA to determine if the agency used personal email accounts to conduct official business

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and if the agency acted in bad faith by willfully misinterpreting Landmark's agreement to narrow the request to senior officials to exclude the former Administrator and Deputy Administrator from its search. Landmark submitted a request to EPA for all records concerning any agency rule or regulation for which public notice was not made, but which was contemplated or considered for public notice from January to August, 2012. The request specifically indicated that Landmark was concerned about allegations that the agency was politicizing its rulemaking process. In an email exchange, the agency asked Landmark if it would narrow its search request to senior officials, which the agency's email cited as "Program Administrators, Deputy Administrators, and Chiefs of Staff." Landmark agreed to do so with the understanding that it was not waiving its right to expand the search if warranted by responsive records. EPA then seemed to take inconsistent positions as to whether a search of senior officials included the Office of the Administrator, although the agency contended in court that it had never intended to, nor did it, exclude such officials from the scope of its search. EPA made a final disclosure on April 12, 2013, releasing 1,134 pages in full and 1,658 pages with redactions. However, shortly after that disclosure the agency decided that its search of records from the former Administrator may have been insufficient and conducted a second search. On May 15, the agency disclosed another 800 pages in full and 1,400 pages with redactions. The agency's disclosures yielded at least one document that appeared to have been sent from a personal email account. Lamberth agreed that based on at least the one concrete example, as well as allegations in the media and Congress, Landmark had raised an issue of genuine material fact as to whether other personal email records existed. Pointing out that the agency had done nothing to clarify this matter, he indicated that "in response, EPA's silence speaks volumes; its failure to deny the allegations that personal accounts were being used to conduct official business leaves open the possibility that they were." Further, he noted, "the record leaves open the possibility that, one way or another, the agency engaged in bad faith conduct by excluding the top politically appointed leaders of the EPA from Landmark's FOIA request at least initially." He observed that "the possibility that EPA engaged in such an apparently bad faith interpretation, raised by Landmark's allegations and supported by EPA's inconsistent filings, precludes this Court from entering summary judgment in their favor as to the adequacy of the search." Ordering discovery limited to these two issues, Lamberth indicated that "the possibility that unsearched personal email accounts may have been used for official business raises the possibility that leaders in the EPA may have purposefully attempted to skirt disclosure under the FOIA. The possibility that the agency purposefully excluded the top leaders of the EPA from the search, at least initially, suggests an unreasonable and bad faith reading of Landmark's FOIA request and subsequent agreement to narrow its scope." He added that "moreover, the EPA's briefing and affidavits on the facts and circumstances surrounding the second point contain numerous inconsistencies and reversals which undermine confidence in their truthfulness." (*Landmark Legal Foundation v. Environmental Protection Agency*, Civil Action No. 12-1726, U.S. District Court for the District of Columbia, Aug. 14)

A federal court in California has ordered the FDA to disclose safety and efficacy data concerning its approval of Truvada to be used pre-exposure to help prevent transmission of HIV because the agency failed to show that Gilead Sciences, Inc., the manufacturer of Truvada, faced any **actual competition** in the relevant market. The AIDS Healthcare Foundation requested records from the FDA on whether Gilead Sciences had applied for new drug use approval. The agency said it could not confirm such an application until either the company confirmed the application or the application was approved by the agency. However, Gilead agreed to reveal to AHF that it had submitted an application for the new use. Nevertheless, AHF filed suit and the court ordered the FDA to produce a *Vaughn* index. Two weeks later, the FDA approved the new use of Truvada, referred to as PrEP, and posted 1,175 pages on its website. The agency asked the court for an extension, which was denied, and a month later the FDA released 2,300 pages, withholding safety and efficacy data and data summaries under **Exemption 4 (confidential business information)** and various outside correspondence, as well as internal agency documents, under **Exemption 5 (deliberative process privilege)**. AHF argued that the safety and efficacy data was not protected by Exemption 4 because Gilead did not face

any actual competition since it was the only manufacturer of the drug and there were no other similar drugs in development. However, Judge Margaret Morrow agreed with the FDA that "there is actual competition in the market for non-PrEP HIV treatment medications, and that market includes Truvada." But after reviewing the FDA's arguments, she noted that "the only competitive harm addressed in the FDA's summary judgment declarations concerns the PrEP market. None of the declarations proffered by the FDA demonstrates that disclosure of the safety and efficacy records that have been withheld would likely cause Gilead to suffer competitive harm in the market for HIV treatment medications—the only market for which the FDA has established actual competition. Because the FDA's only evidence of purported competitive harm concerns a market in which—on the present record—Gilead faces no actual competition, the court concludes that the FDA has failed to adduce evidence establishing a likelihood of substantial competitive injury." She added that "the court finds that the FDA has not established a likelihood that disclosure of the data summaries and analyses withheld under Exemption 4 would cause substantial competitive injury to Gilead" and ordered the agency "to produce complete and unredacted copies of the safety and efficacy records to AHF." The agency fared much better on its Exemption 5 claims. Finding that most of the claimed records were drafts, Morrow pointed out as to one withheld record that "this description clearly indicates that the redacted portions reflect predecisional content, insofar as they did not reflect 'final versions' of the agency's opinions. It also indicates with reasonable specificity that the challenged redactions concern a deliberative process, inasmuch as it specifies that the redacted language concerns the FDA's decisions on Gilead's applications for PrEP approval and the information needed to secure such approval." In another instance, she noted that "while the rule articulated in the cases cited by AHF may entitle it to disclosure of any raw data contained in the data interpretation records, AHF is not entitled to disclosure of predecisional, deliberative draft language reflecting the opinions and suggestions of FDA employees concerning that data." (*AIDS Healthcare Foundation v. United States Food and Drug Administration*, Civil Action No. 11-07925 MMM (JEMx), U.S. District Court for the Central District of California, Aug. 6)

A federal court in New York has rejected a challenge to the D.C. Circuit's holding in *Armstrong v. EOP*, 90 F.3d 553 (D.C. Cir. 1996), finding that the National Security Council is not an **agency** under FOIA. Although for a number of years prior to that decision, the NSC considered itself subject to FOIA, the D.C. Circuit decision found that since the NSC's dominant mission was to advise the President it did not qualify as an agency. By requesting NSC records on drone strikes, Main Street Legal Services launched a head-on challenge to *Armstrong*, arguing that the decision, as well as *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), were incorrect and that changes in the relationship between the way NSC operated supported the conclusion that the agency did more than just advise the President. However, the organization's arguments failed to impress Judge Eric Vitaliano. He pointed out that "notwithstanding the NSC's self-contained structure might *allow* it to wield substantial independent authority, it does not follow that it *in fact* exercises such independence." Vitaliano noted that "the *Armstrong* court considered the fact of the President's chairmanship of the NSC to be 'entitled to significantly greater weight. . .than is the self-contained structure of the entity,' such that the party requesting records could only prevail on a 'strong showing indeed regarding the [self-contained] factor under *Meyer*." Vitaliano explained that "current events have changed little, except perhaps to heighten the American government's concern over (and awareness of) threats to national security interests. The operational proximity between the President and the Council remains exceptionally close under the current administration." He added that "finally, *Armstrong* found—and the Court agrees—that the NSC's delegated powers consist overwhelmingly of advising and assisting the President directly in matters of national security." He indicated that the *Armstrong* court further found that the NSC staff "exercises no substantial authority either to make or to implement policy" independent of the President and served a unique and "quintessentially advisory" role only. Main Street argued that several executive orders provided NSC with policy-making authority. But Vitaliano noted that "although plaintiff relies heavily on references to policy

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'implementation' in these Orders, it ignores the essential truth that these duties are not *substantial* when considered in the context of the NSC's overwhelmingly advisory *raison d'etre*, and fails to consider that any policy-making or –implementing authority granted to the NSC is necessarily and profoundly circumscribed by the President's unique responsibility over national security matters." Vitaliano rejected Main Street's reliance on NSC regulations in which the NSC considered itself an agency. He pointed out that "the NSC's and [the Office of Legal Counsel at the Justice Department's] prior positions are simply irrelevant to the current organizational and operational realities presented in the case submitted for the Court's determination." He also rejected the group's claim that the NSC had issued regulations under the Privacy Act and considered itself not subject to the Presidential Records Act, both of which suggested an implicit admission that it was an agency. Vitaliano disagreed, noting that "these two statutes are separate from FOIA and are to be interpreted in light of their *own* legislative purposes, goals, and histories." (*Main Street Legal Services, Inc. v. National Security Council*, Civil Action No. 13-CV-00948 (ENV), U.S. District Court for the Eastern District of New York, Aug. 7)

Judge Colleen Kollar-Kotelly has ruled that the FBI properly withheld information concerning its role in the investigation and prosecution of Sholom Rubashkin for using illegal immigrants at his meat-packing plant, Agriprocessors, in Iowa under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, **Exemption 7(D) (confidential sources)**, and **Exemption 7(E) (investigatory methods and techniques)**. Although she faulted the agency's **search**, she also rejected Lawrence Rosenberg's claim that the agency had not promptly responded to his request. In her third ruling on Rosenberg's multi-agency FOIA suit, Kollar-Kotelly noted initially that the FBI had located 1,223 potentially responsive pages and had asked Rosenberg in October 2011to commit to pay duplication fees of $112.30 for paper records or $20 for the cost of a CD. Rosenberg did not respond to the agency's letter and the agency closed his request. Rosenberg instead filed suit against several agencies, including the FBI, in March 2012. In response to the litigation, the agency disclosed 39 pages in full and 322 pages in part. It withheld 155 pages pursuant to exemptions and the remaining 450 pages that had been sealed by the U.S. District Court for the Northern District of Iowa. Rosenberg first claimed that he was not required to respond to the FBI's fee commitment letter because the agency's regulations presumed a requester was liable for $25 by merely making a request. But Kollar-Kotelly pointed out that "because the Plaintiff failed to respond to the FBI's letter, the FBI had no way of knowing whether the Plaintiff would elect to receive responsive documents on disk, thus incurring no more than $25 in duplication fees, *or* whether the Plaintiff would elect to receive the documents in hard copy, thus incurring up to $112.30 in duplication fees. [The section of the regulations committing to pay $25] did not come into play unless and until the Plaintiff indicated in which format responsive documents should be produced." Dismissing Rosenberg's claim that the agency had not responded promptly, Kollar-Kotelly noted that "this argument ignores the fact that the FBI's statutory obligation to respond 'promptly' terminated in November 2011 when the Plaintiff failed to response to the agency's October 19, 2011, letter. The Plaintiff offers no authority for the proposition that the FBI's decision to produce documents in response to this litigation triggered any statutory duty to produce documents within a particular time frame." Rosenberg challenged the search by arguing that the agency had narrowed its search terms inappropriately and that it had never explained why it only searched its Central Records System database. Kollar-Kotelly agreed that the agency's explanation was inadequate. She indicated that "neither [of the agency's affidavits] even attempts to establish that the requested communications between the FBI and various third parties prior to or after the raid are likely to be found in the Central Records System." She observed that "the Court finds the FBI failed to meet its burden to show that the search it conducted was reasonably calculated to uncover all relevant communications between that third parties that could be retrieved by conducting queries for 'Agriprocessors Inc.' or 'Sholom Rubashkin.'" She found that "on several pages the FBI redacted information describing actions taken (or not taken) by third parties that does not appear to identify any third party whose identity might be protected by Exemption 6 or Exemption 7(C). Therefore, the FBI must either revise its redactions or provide a

supplemental explanation of the use of Exemptions 6 and 7(C) with respect to [those] pages." Rosenberg challenged the agency's withholding of information about Chief District Court Judge Linda Reade, whom Rosenberg accused of misconduct. But after reviewing Reade's involvement in the case, Kollar-Kotelly commented that "on this record, no reasonable person would belief Chief Judge Reade engaged in misconduct." Upholding several FBI claims under Exemption 7(E), Kollar-Kotelly rejected the agency's 7(E) claim for questions pertaining to an obstruction of justice investigation. She observed that "the FBI offers no explanation as to how revealing the specific questions the agency suggested be asked as part of an investigation of possible obstruction of justice through the placement of a newspaper ad concerning an upcoming trial 'could reasonably be expected to risk circumvention of the law.'" (*Lawrence Rosenberg, v. United States Department of Immigration and Customs Enforcement*, Civil Action No. 12-452 (CKK), U.S. District Court for the District of Columbia, Aug. 11)

The Fourth Circuit has ruled that the Social Security Administration properly withheld various data elements from reporter Joel Havemann under **Exemption 6 (invasion of privacy)** because the information in combination could lead to the identification of individuals. Havemann made six requests in March 2010 pertaining to categories of beneficiaries, including some that overlapped with VA benefits. He filed suit in June and the agency responded to his requests in August, indicating that it would provide some of the data he requested but that the disclosure of other data elements would threaten to identify individuals. The district court ruled in favor of the agency and Havemann appealed. In a per curiam decision, the Fourth Circuit agreed with the district court. The court agreed with the agency's decision "to deny disclosure because of the possibility that the data could be used to single out certain beneficiaries," and rejected Havemann's challenge because it focused on "whether singular pieces of withheld data could lead to the identification of individuals rather than on whether those pieces of data working in combination with other information could assist in such identification." While Havemann argued that disclosure of all the data elements would shed light on government operations, the court pointed out that "the SSA has provided significant details for more than 140 million individuals, and such details appear sufficient to allow Havemann to conduct his analysis. To the extent that they are lacking, we do not believe that the marginal gains ostensibly possible through further disclosure are worth the burdens that will likely result to beneficiaries' privacy interests." Havemann claimed he was entitled to **attorney's fees** because he brought suit before the agency responded. But the court noted that "we decline to explore this argument further, however, because, as the SSA points out, Havemann failed to comply with the requirements of Federal Rule of Civil Procedure 54 regarding claims for attorney's fees [which requires the party to file a motion requesting fees]." (*Joel Havemann v. Carolyn W. Colvin*, No. 12-2453, U.S. Court of Appeals for the Fourth Circuit, Aug. 1)

A federal magistrate judge in California has ruled that a FOIA request sent by Anne Marie Alexander to the FBI's San Francisco field office was received by the agency and that Alexander has **exhausted her administrative remedies** as a result. The FBI argued that its policy in place since the 2009 Attorney General's Memo on FOIA required requests be sent to its headquarters location, that Alexander had not proved that the agency actually received her request, and that, by failing to specify the locations to be searched, the request was not specific enough. Although the FBI's policy on where to send requests was changed in 2009, the magistrate judge pointed out that Alexander had properly complied with published Department of Justice regulations, which required that requests be sent to the relevant field office. The magistrate judge noted that "if the FBI believes its requirements for submitting FOIA requests have indeed substantively changed, then the published regulations should be properly amended to reflect the modified requirements. Defendant cannot prevail on the argument that Plaintiff did not follow proper procedure when Plaintiff clearly complied with the agency's own published rules regarding how FOIA submissions should be

made." The magistrate judge also found the agency's claim that there was no record that the San Francisco field office had received Alexander's request wanting. The magistrate judge pointed out that "plaintiff sent her FOIA request to the correct office location in accordance with the regulations promulgated by DOJ, and the FBI's own records tentatively indicate receipt of Plaintiff's fax." Finally, the magistrate judge indicated that Alexander had provided evidence that she made her request. The magistrate judge observed that "this Court already found that the exhibits attached to [her] original complaint were adequate to show that a request was made. . ." (*Anne Marie Alexander v. United States*, Civil Action No. 13-00678 JSC, U.S. District Court for the Northern District of California, Aug. 5)

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**Editor's Note:** *Access Reports* will take a break after this issue. The next issue, v. 39, n. 18, will be dated September 11, 2013.