Volume 39, Number 20
October 9, 2013

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Sen. Patrick Leahy (D-VT) issued a statement Oct. 5 on the impact of the government shutdown on the judiciary and the Justice Department. Noting that FOIA processing and litigation had come to a temporary halt, he observed that "right now, Americans seeking help with Freedom of Information Act requests encounter 'closed for business' signs at many of the Federal offices that facilitate them." He pointed out that OGIS was closed and indicated that "the Department of Justice has also sought stays in several important FOIA cases. . ." He noted that FOIA processing had been suspended at the Social Security Administration, the FTC, and the NSA and pointed out that "many other Federal agencies have either taken their websites off-line or stopped updating their websites. We literally have a closed government."

Court Finds Required Reports Partially Protected

Forced to rely largely on affidavits submitted by the drug companies Pfizer and Purdue, Judge Beryl Howell has ruled that some records submitted by the companies pursuant to reporting requirements contained in Corporate Integrity Agreements qualify as confidential under Exemption 4 (confidential business information) and that the companies have shown that disclosure of a subset of those records would cause competitive harm.

Both Pfizer and Purdue entered into CIAs with the Office of Inspector General because of improper off-label promotions of drugs. The agreements contained standard provisions that the OIG would not seek to exclude the companies from participation in Federal health care programs in return for the company taking steps to come into compliance. Part of the agreement required both companies to submit annual reports. Public Citizen requested the annual reports submitted under Pfizer's 2004 CIA and Purdue's 2007 CIA from the Office of the Inspector General at the Department of Health and Human Services. The agency located 1,177 pages pertaining to Purdue's annual reports and withheld nearly 1,100 pages entirely under Exemption 4. The

ACCESS REPORTS

agency located 9,432 pages pertaining to Pfizer's reports , withholding 5,216 pages entirely and 4,216 pages in part. Public Citizen appealed the agency's decision, but filed suit before a decision was made.

Public Citizen challenged the adequacy of the agency's search, focusing primarily on several Pfizer annual reports that appeared to be missing. The agency pointed to heavily redacted letters from Pfizer indicating that reports had been submitted in 2005, 2008, and 2009. Howell noted that "the documents described in the Pfizer *Vaughn* Index. . .related only to the first, third, and possibly final 2009 Annual Reports. . . .[I]t appears that Pfizer's [annual reports] for at least two years were neither released to the plaintiff nor referenced in the *Vaughn* index, and, thus, are correctly deemed 'missing' by the plaintiff." Howell agreed with Public Citizen that the documents attached to the 2005, 2008, and 2009 letters from Pfizer pertained to information requested by OIG and not the annual reports. She indicated that "as a factual matter, the plaintiff has raised a significant question as to whether the letters listed in the *Vaughn* index entries actually correspond to the information referenced in the CIA [concerning annual reports]."

Howell then explored the meaning of "commercial" for purposes of Exemption 4. She noted that "the scope of 'commercial' information has been applied. . .broadly to records containing information in which the provider has 'a commercial interest.'" Pfizer urged her to accept a broader construction of the exemption to find that "a company has a 'commercial interest' in all records that relate to every aspect of the company's trade or business,'" but she observed that "this is plainly incorrect." Public Citizen argued that hardly anything in the CIAs was commercial because it pertained to violations of law or regulations. Howell rejected Public Citizen's restrictions, noting that "using its ordinary meaning, the term 'commercial' is not limited only to lawful activities but also extends more broadly to any type of activity bearing on commerce." She pointed out that "the overall commercial nature of an undertaking is not altered when some aspect of that activity is suspected to constitute, or actually results in, a violation of a rule, regulation or statutory requirement. This is particularly true in the context of a heavily regulated industry, such as pharmaceuticals."

Public Citizen challenged the application of Exemption 4 to eight categories of records identified by the agency. While she found some of the categories did not qualify as commercial others clearly did. The companies were required to show that employees and contractors had not been excluded from participation in federal health or procurement programs. She noted that information about how the company fulfilled the requirements of the CIA regarding ineligible persons constituted "such modifications to internal processes [that] are sufficiently commercial to qualify for Exemption 4 because they involve the process by which the companies make decisions about managing and conducting their business operations." But she observed that the names of ineligible persons were "static" and did not appear to be "instrumental" to conducting commerce. She found that investigations or legal proceedings involving alleged wrongdoing were commercial. She pointed out that "common sense dictates that such allegations about the company itself relate to the conduct of employees and/or policies and practices of management in the operation of the companies' business and thereby implicate the companies' 'commercial interests.'" But the identity of the investigating agency was not commercial. She indicated that "the identity of an outside agency conducting an investigation and that investigation's status (e.g., closed, ongoing, active, stayed, dormant, etc.) would not, standing alone, reveal any information about the business operations or other commercial activities of [the companies.]" She explained that embarrassment or reputational harm from disclosure of an investigation "does not convert the information into 'commercial' under Exemption 4." She found that records concerning incidents of off-label promotions were also commercial.

The agency argued disclosure of records withheld under Exemption 4 would impair its ability to get the quality of submissions it needed and to negotiate CIAs in the future. Howell rejected the claim, noting that "the government is well-protected by the penalty terms of the CIAs for breaches of the reporting requirements. The CIAs contain extensive monetary and injunctive penalties for violations of the agreement, including

exclusion from federal health care programs, the so-called 'death penalty.'" As to the difficulties negotiating with companies, Howell observed that "it strains credulity to believe that the specter of potential disclosure under the FOIA of certain information required to be submitted to the agency pursuant to a CIA's requirements would lead a pharmaceutical company to choose instead the risk of exclusion from federal drug reimbursement programs."

Applying the competitive harm test to those records she had concluded were commercial, Howell found the information about ineligible persons was protected, but that information about legal proceedings was not. She found that Pfizer's communications with the FDA concerning off-label marketing were only partially protected since the company admitted they usually contained confidential information, but not always. Calling Pfizer's own assessments of its off-label practices "murky," Howell noted that "nevertheless, since the off-label findings by Pfizer reflect the company's 'findings' about its own sales force's activities, the potential risk of competitive harm from disclosure of what those activities are is plain." Finally, she found disclosure of Independent Review Organization reports assessing Pfizer and Purdue's policies would cause the companies' competitive harm. She pointed out that "it is thus obvious that the release of such information would be akin to releasing customer lists which could easily be used affirmatively by competitors to harm Purdue. Similarly, a competitor could certainly use internal details of the sale and marketing of Pfizer's products against it in a number of ways, such as setting prices, competing for ad space, or identifying areas of strength or weakness." (*Public Citizen v. United States Department of Health and Human Services*, Civil Action No. 11-1681 (BAH), U.S. District Court for the District of Columbia, Oct. 4)

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 a trial court judge erred when he concluded that a public records act suit filed by Laura Guarino against the City of Fontana was frivolous and as a result that the law firm she was working for was not entitled to any attorney's fees. Guarino requested any monetary claims made against Fontana police officers for civil rights violations. The City first said it could not respond to her request because it was only able to locate records based on claimant names, not the kind of claim. After further discussions, the City indicated that it needed to clarify the definition of "civil rights." She eventually accepted the City's definition and the City eventually released more than 300 pages. A trial court judge, noting the number of documents the City had disclosed after litigation, ruled that the City could redact certain personal information. The issue of fees was heard by a second judge after the first judge was unavailable. The second judge found that Guarino was entitled to $54,500 in attorney's fees. The City argued that the second judge was prejudiced and the attorney's fees issue was reassigned to Judge David Cohn. Although Cohn agreed that Guarino had substantially prevailed, he ultimately accepted the City's argument that the suit was filed by Guarino's law firm solely for the purpose of generating fees. As a result, he applied a "zero multiplier," finding the firm's work was worthless and that Guarino should receive no fees at all. Guarino appealed and the appellate court reversed. The court noted that "the sheer volume of documents obtained by plaintiff mitigates against a determination her victory was 'minimal" and indicated that since she got all the records she requested with some redactions, "plaintiff's victory could hardly be declared 'insignificant.'" The court observed that "plaintiff's purpose in obtaining the requested materials is immaterial when determining whether

ACCESS REPORTS

she prevailed in this litigation. Rather, the proper determination is whether the City should have released the requested materials without litigation, and whether it eventually did disclose documents due to the suit. Here, the answer to both questions is yes." The court rejected the City's contention that Guarino was acting as a "straw man" for her law firm. The court noted that "it is irrelevant that plaintiff worked for the firm because she met the threshold requirement" by having an attorney-client relationship with the attorneys representing her. Acknowledging that trial court judges had considerable discretion in awarding attorney's fees, the court pointed out that "the [trial court judge's] decision to impose a zero negative multiplier, effectively denying the mandatory attorney fee award, does not appear to be based on any objective criteria; rather, it appears to be based on its own subjective determination of the value of the litigation." (*Laura Guarino v. City of Fontana*, No. E054357, California Court of Appeal, Fourth District, Division 2, Sept. 26)

The Federal Courts…

A federal court in California has ruled that *Vaughn* indices submitted by a number of intelligence agencies to withhold information sent by the agencies to the Intelligence Oversight Board, a five-member committee of the President's Intelligence Advisory Board tasked with informing the President of intelligence activities it believes may be unlawful or contrary to executive order or presidential directive, do not sufficiently explain why information is being withheld under **Exemption 1 (national security)**, **Exemption 5 (privileges)**, **Exemption 7(D) (confidential sources)**, or **Exemption 7(E) (investigative methods and techniques)** and has ordered the agencies to either release the information or provide a better justification. Judge Saundra Brown Armstrong initially observed that "deference [to agency declarations] is not equivalent to acquiescence; an agency's declaration may justify summary judgment only if it is sufficient 'to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.'" Using this standard, she found virtually all the exemption claims made by the Defense Department, Homeland Security, and the FBI inadequately supported. Rejecting the FBI's Exemption 1 claims, she noted that "the FBI's explanations are categorical descriptions of redacted material coupled with the categorical indication of anticipated consequences of disclosure, which are 'clearly inadequate.'. . .[The agency's] generalized assertions and boilerplate fall far short of the detail required to demonstrate that information was properly withheld under FOIA." She found deliberative process claims made by the Office of the Director of National Intelligence to be inadequate as well. She pointed out that "ONDI [has not] provided a relatively detailed explanation identifying the specific reasons why information was withheld under the deliberative process privilege. [The agency] only offers a general description of the withheld information coupled with a generalized indication of possible consequences of disclosing the information. Such a showing is insufficient to satisfy the reasonable specificity standard." The FBI's attorney-client privilege claims also came up short. Armstrong noted that "the FBI has not provided sufficient information from which the Court can conclude that the redacted documents involve the provision of specific legal advice and that they were intended to be confidential and were kept confidential." As to Exemption 7(E) claims made by Homeland Security, she observed that "[the agency] simply parrots the language of the claimed exemption without providing any detail as to why the release of the withheld portions of the documents would reasonably risk circumvention of the law." Rejecting the agencies' **segregability** claims in toto, Armstrong pointed out that "none of the Defendants has offered a particularized explanation establishing that all reasonably segregable portions of each challenged document have been segregated and disclosed." (*Electronic Frontier Foundation v. Central Intelligence Agency, et al.*, Civil Action No. 4:09-cv-03351 SBA, U.S. District Court for the Northern District of California, Oakland Division, Sept.30)

Judge Emmet Sullivan has ruled that the EPA failed to show that it conducted an **adequate search** for records responsive to parts of Utah Attorney General Mark Shurtleff's multi-part FOIA request concerning its 2009 Endangerment Finding that greenhouse gases posed a danger to public health and welfare and that, while it properly withheld certain records under **Exemption 5 (privileges)**, it has not yet justified its invocation of attorney-client privilege. Shurtleff's case was initially referred to Magistrate Judge Deborah Robinson and Sullivan adopted almost all of her recommendations except for her conclusion that the agency's search had been adequate. Instead, Sullivan found that where the agency had separated subparts of the request into phases its search had been adequate. For these subparts, EPA identified the individuals likely to have responsive information and set forth search parameters that included the subsections of the request at issue, files to be searched, time period covered by the search, and substantive instructions for individual subsections. He rejected Shurtleff's contention that the phased searches were inadequate because they only set forth specific search terms with respect to one subsection. He noted that "it would elevate form over substance to deem a search inadequate because the phrase 'search term' or 'keyword' is not used, particularly in a situation such as this, where the request sought extensive records regarding an enormous scientific and regulatory undertaking, and required the participation of hundreds of people with diverse roles, backgrounds, and expertise within the agency." But for those portions of Shurtleff's request that were not subject to the phased search, Sullivan found the agency's justifications lacking. He pointed out that the descriptions of those searches "fall far short of the adequacy standards set forth by this Circuit, as they lack detail and make no reference to the types of searches, search terms, methods or processes used." Shurtleff argued that the inclusion of staffers whose records were not searched in extensive email chains suggested that the agency should have searched those staffers' emails as well. Sullivan, however, observed that "plaintiff does not point to anything within the emails that suggests the existence of documents that the EPA could not have located without expanding the scope of its search. . .The fact that a few EPA employees were not instructed to search their files were involved in a total of twenty-four email chains (among 13,000 documents produced) is insufficient, without more, to raise a 'substantial doubt' about the adequacy of the search that was performed." Shurtleff argued that some emails were not deliberative because they did not pertain to any EPA policy-making process. But Sullivan pointed out that "although the EPA may not have initiated the policy development process, there can be no serious dispute that the comments relate to the formulation of climate change policy by the Executive Branch." Sullivan agreed that the agency had failed to justify a claim made under the attorney-client privilege. He indicated that "the declarations are too conclusory to grant summary judgment to the Agency. The EPA has not provided information which clearly delineates either (1) the individuals who received the communication, or (2) whether those individuals, by virtue of their responsibilities, 'are authorized to act or speak for the organization in relation to the subject matter of the communication.'" He affirmed the agency's attorney work-product claim for an email from an agency attorney concerning responses to public comments. He noted that "in such a situation, the Agency's response to comments is the type of document that clearly anticipates legal challenges to the Agency's finding and seeks to preemptively defend against them by crafting the strongest possible counter arguments in the Response to Comments." Sullivan rejected Shurtleff's contention that it was improper for the agency to respond to parts of his request by directing him to publicly available records. He observed that "plaintiff has cited no cases, and the Court is aware of none, that impose the additional requirement that the agency then search through those available records to pinpoint the specific documents of most use to the requester. The EPA has fulfilled its obligation by directing plaintiff to publicly available records which specifically relate to the Endangerment Finding and are responsive to four subsections of his request." (*Mark L. Shurtleff v. United States Environmental Protection Agency*, Civil Action No. 10-2030 (EGS/DAR), U.S. District Court for the District of Columbia, Sept. 30)

ACCESS REPORTS

Judge Emmet Sullivan has ruled that the Consumer Financial Protection Bureau properly withheld several documents under **Exemption 5 (privileges)**, but that it failed to show that one email exchange with a White House staffer qualified under the exemption's "inter- or intra-agency" threshold. Judicial Watch filed two related requests concerning the recess appointment of Richard Cordray to head the CFPB. Although the agency contacted Judicial Watch concerning its processing of the request, Judicial Watch filed suit before the agency's final response. The agency argued that Judicial Watch had **failed to exhaust its administrative remedies**. Judicial Watch argued that because neither the agency's two acknowledgement letters nor its interim response provided Judicial Watch with notice of its right to appeal, the agency's responses did not qualify as a determination under *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013). Although Sullivan became the first district court judge since the *CREW v. FEC* decision to indicate that the requirement in *Oglesby v. Dept of Army* that a requester file an appeal if the agency responded before suit was filed was still good law, he nevertheless sided with Judicial Watch. He agreed that "CFPB's letters issued prior to the initiation of this case are insufficient to trigger the exhaustion requirement [because they failed to give notice of Judicial Watch's right to appeal]. CFPB only provided plaintiff with the notice of the right to appeal in its June 8 letter. However, because this letter was issued *after* plaintiff initiated this lawsuit, it cannot be used to cure CFPB's failure to timely respond to FOIA requests." Sullivan found that briefing materials prepared for Secretary Timothy Geithner were protected by the deliberative process privilege. He indicated that "internal communications regarding how to respond to media and Congressional inquiries have repeatedly been held to be protected under the deliberative process privilege." But he found the agency so far had failed to justify the privilege for an email exchange with a White House staffer. He pointed out that "because FOIA's deliberative process privilege applies to certain employees working in the White House but not to all, the application of the privilege hinges on what capacity in the White House [the staffer] worked, and for what office. The Bureau's declaration and *Vaughn* index do not provide this information." Judicial Watch argued that exchanges between the agency and its DOJ attorneys concerning Cordray's appointment were not protected by the attorney work-product privilege. Sullivan disagreed, noting that "the documents were prepared in reasonable anticipation of litigation challenging the appointment of Director Cordray. . .The emails at issue here were written within one to four weeks following the recess appointment" and "they involve the Justice Department attorneys authorized to represent the Bureau in litigation." Sullivan rejected Judicial Watch's contention that email exchanges between White House counsel and CFPB employees were too far removed to be protected by the presidential communications privilege. Instead, he observed that "it is. . .undisputed that the withheld communications related to the President's appointment of Director Cordray, and they occurred before and immediately after the appointment. Communications generated in the course of advising the President in the exercise of his appointment and removal power are clearly protected by the presidential communication privilege." (*Judicial Watch, Inc. v. Consumer Financial Protection Bureau*, Civil Action No. 1:12-00931 (EGS), U.S. District Court for the District of Columbia, Sept. 30)

Judge Amy Berman Jackson has ruled that the Treasury Department's Financial Management Service cannot withhold the names of unsuccessful contract bidders under **Exemption 3 (other statutes)**. Scott Hodes requested information pertaining to a solicitation for a contract for debt collection services. FMS withhold much of the information under Exemption 4 (confidential business information) and 41 U.S.C. § 4702(b), which allows agencies to withhold contract proposals unless they are incorporated into the final contract. As a result, FMS withheld the names of unsuccessful bidders. Hodes challenged the withholding of unsuccessful bidders, arguing that the definition of "proposal" in § 4702(b) did not cover the identities of unsuccessful bidders. Jackson agreed, indicating that "the text of the statute does not compel FMS's interpretation and that adopting the broad reading advanced by the agency here would be contrary to the purpose underlying FOIA and the requirement that exemptions be construed narrowly." She noted that "the statute does not directly address the question, but it does define 'proposal' to mean 'a proposal, including a technical, management, or cost proposal, *submitted by a contractor* in response to the requirements of a solicitation for a competitive

proposal. Defining the 'proposal' as an item 'submitted by' the contractor implicitly differentiates the document from the bidding party. The clause elaborating on the definition to explain that the term 'proposal' includes technical, management, or cost proposals and the fact that the clause is set off from 'submitted by a contractor' with a comma, further suggests that the term refers to what is being submitted rather than who it is submitted by. In other words, the phrase 'submitted by a contractor' is meant to modify the word 'proposal.'" Reviewing the legislative history, Jackson explained the exemption was created to lessen the burden on agencies to do line-by-line review of proposals that were largely proprietary. But, she pointed out, "here, the information sought is not material that would have been otherwise exempt, and the disclosure of just the names of unsuccessful bidders would not enable parties to gain access to proprietary cost or technical information." FMS argued it did not have the names of unsuccessful bidders except as they appeared in the protected proposals. But Jackson observed that "to the extent FMS is in possession of other documents containing the requested information—such as the redacted attachment [containing a list of bidders]—it is required to produce those responsive records in unredacted form." (*Scott Hodes v. U.S. Department of Treasury*, Civil Action No. 12-1435 (ABJ), U.S. District Court for the District of Columbia, Sept. 25)

Judge Ketanji Brown Jackson has ruled that the Office of the Armed Forces Medical Examiner has shown that no factual information can be **segregated** from preliminary autopsy reports for soldiers killed in combat and that the preliminary autopsy reports can be withheld in their entirety under **Exemption 5 (deliberative process privilege)**. In previous rulings, Judge Emmet Sullivan had ordered final autopsy reports disclosed. Resolving the final dispute in a case brought by journalist Roger Charles, who was researching the effectiveness of body armor, Brown remarked initially that Sullivan had ruled previously that, while the preliminary autopsy reports qualified as drafts under Exemption 5, the AFMES had not yet adequately justified its claim that factual information could not be segregated and disclosed. Relying on *Russell v. Dept of Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), in which the D.C. Circuit found that a draft history of the Air Force's role in using Agent Orange during the Vietnam War was protected by Exemption 5, Jackson noted that "the AFMES's preliminary autopsy reports are drafts that are transformed into final autopsy reports regarding deceased service members such as the ones that have already been ordered disclosed." She agreed with the agency that "preliminary autopsy reports reflect the incomplete findings of single AFMES forensic pathologists at the outset of a staged autopsy review process" and noted that "the linchpin of the D.C. Circuit's decision in *Russell* was the fact that it was possible to *compare* the draft and final versions of the manuscript at issue." She explained that "the Court has already concluded that the final autopsy reports in the instant case are not exempt from disclosure; therefore, if the preliminary autopsy reports are produced, a realistic opportunity for comparison of the draft to the final exists. And Defendants' submissions clearly demonstrate that there is, in fact, a comparison to be made because the preliminary and final autopsy reports can differ significantly." Charles argued the agency had not shown why facts could not be disclosed. But Jackson pointed out that "a simple comparison would reveal the agency's 'editorial judgment' and to require Defendants to say more—*e.g.*, to make them flesh out with specificity precisely *how* a comparison between the two records would evidence the agency's deliberations—risks revealing the very discretionary determinations that FOIA Exemption 5 entitles the agency to protect." (*Roger G. Charles v. Office of the Armed Forces Medical Examiner*, Civil Action No. 09-0199 (KBJ), U.S. District Court for the District of Columbia, Oct. 2)

Judge Amy Berman Jackson has ruled that resignation letters pertaining to Assistant U.S. Attorney Lesa Gail Bridges Jackson, who had misrepresented to the Department of Justice that she had a valid state license to practice law, are not protected by **Exemption 6 (invasion of privacy)** because the public interest in disclosure outweighs Jackson's privacy interest. Because she considered DOJ's previous justification for withholding the

ACCESS REPORTS

records insufficient, Jackson reviewed the documents *in camera*. She noted that "these documents relate to plaintiff's articulated public interest because they demonstrate how DOJ handled Jackson's salary adjustments immediately after she resigned. This public interest outweighs any privacy interest because information about 'present and past annual salary rates' is already publicly available. . ." Jackson indicated that "although Jackson has some privacy interest in the changed in her employment status, the fact that she resigned is public knowledge, and plaintiff's interest in these documents is focused on how DOJ processed her resignation. The public interest in DOJ's processes outweighs the AUSA's minimal privacy interest in the already disclosed fact that she resigned." The agency argued that the withheld forms contained nothing but biographical information that was properly withheld. But finding the agency had not properly **segregated** non-exempt information in the forms, Jackson pointed out that "the contested documents contain more than biographical information. They contain information regarding salary adjustments and the agency action to effectuate Jackson's resignation, which the Court has determined must be disclosed." (*Lonnie J. Parker v. U.S. Department of Justice*, Civil Action No. 10-2068 (ABJ), U.S. District Court for the District of Columbia, Sept. 30)

Judge Colleen Kollar-Kotelly has concluded Carl Oglesby's 1987 FOIA suit for records concerning the government's post-World War II connection with German General Reinhard Gehlen, whose Nazi spy ring was allegedly allowed to continue after the War, by ruling that the CIA and the Army conducted **adequate searches**. Oglesby had since died, but the court allowed his domestic partner and daughter to replace him as plaintiffs. In its second decision in the case, *Oglesby v. Department of Army*, 79 F.3d 1172 (D.C. Cir. 1996), the D.C. Circuit found that the Army and the CIA had not shown that they conducted an adequate search. On remand, the agencies renewed their motion for summary judgment in 1997. But before any further court consideration, President Bill Clinton signed the Nazi War Crimes Disclosure Act in 1998 requiring the declassification and disclosure of records on Nazi war crimes. Although the Gehlen was not considered a Nazi war criminal, the CIA pledged to acknowledge its intelligence relationship with him. As a result, a 2,100 page Army file was disclosed, as was an additional 2,100 pages from CIA files concerning Gehlen. Subsequently, the CIA declassified its relationship with the Gehlen Organization, resulting in a need to reprocess its records. The court received a status report in 2001, but neither party provided any further court documentation until a December 2011 motion to replace Oglesby as the plaintiff. Oglesby attacked the adequacy of the CIA's search by noting that the agency had indicated in 2000 that it expected to find responsive records outside the scope of the Nazi War Crimes Disclosure Act. But Kollar-Kotelly explained that "this statement was based on CIA's initial, narrow interpretation of its obligations under the NWCDA insofar as the CIA believed it would not be required to produce documents relating to General Gehlen under the NWCDA because General Gehlen is not considered a war criminal. In 2005, the CIA elected to review and declassify information regarding *all Nazis* (not just war criminals), including operational files concerning those Nazis." Oglesby argued the CIA had failed to release any records pertaining to a meeting with General Gehlen at Fort Hunt. Oglesby offered two recent articles indicating Fort Hunt had been used as a detention center for German scientists. But Kollar-Kotelly observed that "neither article supports the contention that documents regarding the specific meeting identified in Mr. Oglesby's request exist, and fall far short of creating a genuine issue of fact with respect to the adequacy of the CIA's search for documents." To comply with the NWCDA, the Army transferred classified intelligence and counterintelligence records from the Intelligence and Security Command Investigative Records Repository to the National Archives for processing. Oglesby asserted that the Army's records transfer to NARA was suspicious. But Kollar-Kotelly pointed out that "here, the Army's transfer of documents is anything but suspicious. The NWCDA specifically ordered that agencies make relevant documents available to the public at the National Archives and Records Administration. The Army did not transfer only those documents potentially responsive to Oglesby's request, rather it transferred *all* combat and operational files related to World War II." She added that "the fact that the Army produced over 1,420 pages of information to Oglesby prior to 1997 and did not transfer the IRR files to NARA until nearly sixteen years after the receipt of Oglesby's request undermines any suggestion that the transfer was motivated by a desire to

avoid complying with the Army's statutory obligations under the FOIA." (*Aron DiBacco, et al. v. U.S. Department of the Army*, Civil Action No. 87-3349 (CKK), U.S. District Court for the District of Columbia, Sept. 26)

A federal court in Illinois has ruled that Neal Nelson **failed to exhaust his administrative remedies** pertaining to a request for which the Army had indicated he would owe $4,000 to cover the costs of pre-disclosure notification to business submitters. Nelson had developed a software program that allowed users of newer computers to access programs written for older machines and had licensed it for use by the U.S. Army. He believed the Army was allowing third parties to use the software. He complained to the Army, which investigated the charges and found no violations. In February 2008 he made a FOIA request for a draft version of the report, which he believed concluded that the Army was at fault. This report was initially withheld under **Exemption 5 (privileges)**, but Nelson's appeal was denied on the basis that the draft document no longer existed. Prior to this request, Nelson, in 2007, had requested records showing any non-government use of his software between 2001 and 2006. After getting no response, he followed with another request in 2009 for essentially the same information for the time up to 2009. These requests were denied for failure to pay the cost of pre-disclosure notification. Nelson litigated that charge and lost. He then paid $1159 and received a response in March 2012 in which some information was withheld under **Exemption 4 (confidential business information)**. Nelson appealed to the initial denial authority, which upheld most of the exemption claims and told him he could file a further appeal with the Secretary of the Army. Nelson did not appeal the request further. He submitted a final FOIA request in 2012 for more extensive records concerning any third party use of his software. He received a fee estimate of $4,075 to cover the costs of pre-disclosure notification, but never responded. The court first noted that the Army had asked that Nelson's case be bifurcated, hearing the exhaustion claims first and the exemption claims later. But the Army then suggested the court hear both claims, which the court rejected as being unfair to Nelson. Nelson argued that he had appealed the Army's denial of his 2007 and 2009 requests pertaining to pre-disclosure notification costs. The court noted, however, that "those letters [from the Army] address Plaintiff's responsibility to play PDN fees which were the subject of the parties' prior litigation before this court. . .Plaintiff ultimately paid the PDN fees in 2011 and in 2012 the Army completed its disclosure relating to Nelson's 2007 and 2009 FOIA requests. Nelson subsequently sought a formal denial related to the information redacted from Defendant's 2012 disclosures and the Army IDA issued a formal denial on April 19, 2012. Rather than appealing the IDA decision to the Secretary of the Army, as required to exhaust his administrative remedies, Plaintiff filed the instant suit. Because Plaintiff failed to pursue appellate review from the head of the agency, he has failed to actually exhaust his administrative remedies under the FOIA." As to his failure to appeal the pre-disclosure notification costs for his 2012 request, the court observed that "Regardless of whether Nelson constructively exhausted his administrative remedies [because the agency failed to respond to his request in time], however, he is not entitled to judicial review. Plaintiff is statutorily obligated to pay all fees which the Army is authorized to collect, and constructive exhaustion does not relieve him of this obligation." (*Neal Nelson v. United States Army*, Civil Action No. 12 C 4718, U.S. District Court for the Northern District of Illinois, Eastern Division, Sept. 25)

Judge Amy Berman Jackson has ruled that neither EPIC nor any of four individuals has standing to challenge a final rule promulgated by the Department of Education defining student identification numbers as disclosable directory information under the Federal Educational and Privacy Rights Act and potentially expanding the number of organizations qualified to obtain directory information for audits or evaluations of federal or state-supported education programs. The four individuals argued that their personal information was at a higher risk of being subject to identity theft. But Jackson pointed out that Pablo Garcia Molina, a doctoral student at Georgetown, was the only plaintiff who was currently still in school and potentially subject to the change. Jackson noted the plaintiffs had not shown that disclosure of Molina's Georgetown ID number

would put him at risk of identity theft. She observed that "even if the display of Molina's university ID number on his badge makes it more likely that the ID number will be seen by someone who wants to misuse Molina's personal information, that individual would still need Molina's PIN or password to access the information. Neither the PIN nor the password would be present on the badge or otherwise easily accessible. Accordingly, plaintiffs lack a crucial element of establishing that disclosure of Molina's student ID number on his student badge increases the likelihood his personal information will be accessed by an unauthorized individual and misused, let alone that such likelihood is substantial as an absolute matter." EPIC argued that if the ID information was made more accessible it would likely be disclosed to statewide longitudinal data systems, but Jackson indicated that "just because the states maintain SLDSs, however, does not mean that the particular information that the colleges and universities maintain about the plaintiffs will be included in those SLDSs." She added that "plaintiffs fail to present factual allegations or adduce evidence to demonstrate any likelihood that plaintiffs' personal information will be disclosed to *unregulated* third-party entities or to show any likelihood that plaintiffs' information will be used in a way that injures them even if their information is disclosed to such entities." EPIC claimed it had associational standing. But Jackson pointed out that "the fact that EPIC has had to redirect some of its resources from one legislative agenda to another is insufficient to give it standing. EPIC cannot convert an ordinary program cost—advocating for and educating about its interests—into an injury in fact." (*Electronic Privacy Information Center v. U.S. Department of Education*, Civil Action No. 12-0327 (ABJ), U.S. District Court for the District of Columbia, Sept. 26)

■ ■ ■

Access Reports is also available via email, in Word or PDF versions. Continuing problems with mail delivery at government agencies in Washington may make the email version particularly useful and attractive. For more information or to change your current method of delivery, please contact us at 434.384-5334 or hhammitt@accessreports.com.