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Washington Focus: Settling a suit brought by immigration attorney Jeffrey Martins, the U.S. Citizenship and Immigration Services has agreed to disclose 10 unredacted alien files for Martins' clients after U.S. District Court Judge Laurel Beeler found that interview notes were not generically exempt under Exemption 5. The agreement noted that "within three months, USCIS shall instruct officers, employees, and agents involved in the processing of FOIA requests, including those made by plaintiff on behalf of his clients, for A-Files or for asylum officer interview notes specifically, that records reflecting information and questions asked by officers and responses given by applicants to asylum interviews shall be produced. This instruction will preclude the withholding of such documents on the basis that asylum interview notes are generically protected by the deliberative process privilege by virtue of their status as asylum interview notes.". . .The Washington Post pointed out Nov. 15 that the State Department has still failed to produce the names of 100 special government employees in response to a request from ProPublica. The agency initially told ProPublica that because no specific list existed they were not required to conduct extensive research to compile one. ProPublica then told State that the organization would write about the refusal and State indicated the records would be released shortly. However, four months after the original request, no records have been disclosed.

Court Finds No Invasion of Privacy In Disclosure of List of Invitees

Concluding that disclosure of a list of more than 3,800 individuals invited to attend the Change of Command Ceremony for Admiral Jeremy Michael Boorda at the Naval Academy in April 1994 would not constitute a clearly unwarranted invasion of privacy, a federal court in Georgia has ruled that the Navy must disclose the list to Thomas Sikes.

Boorda, the first Chief of Naval Operations to enter the Navy as an enlisted sailor and to not attend the Naval Academy, served from April 1994 until his death in May 1996.

Boorda was found dead at his home and during the investigation of his death, the Naval Criminal Investigative Service found several items that appeared to be related to official business in Boorda's vehicle. NCIS concluded Boorda's death was a suicide.

Sikes submitted two FOIA requests to the Navy and told the agency he was researching Boorda's career and death in anticipation of writing a book. The first request was for the list of invitees to the Change of Command Ceremony. Invitees to the ceremony included President Bill Clinton, Vice President Al Gore, Secretary of Defense William Perry, and members of Congress. The event was also covered by Navy media as well as reporters from the *Washington Post*, *The Navy Times*, and *The Annapolis Capital Gazette.* The Navy disclosed the list with half of the names redacted, explaining that disclosure of the names of individuals who did not hold "public facing roles" would be an unwarranted invasion of privacy under Exemption 6 (invasion of privacy). The Navy's decision was upheld on appeal. The second request asked for the records recovered from Boorda's vehicle during the investigation of his death. NCIS denied the request, indicating the records were stored in an evidence locker and were not agency records subject to FOIA. On appeal, the Office of the JAG concluded the records were Boorda's personal records not subject to FOIA. Four months later, the Navy released the records, claiming they had located them after the original response to Sikes' second request. Sikes then filed suit.

After noting that "it is imperative that courts maintain a low threshold for consideration under Exemption 6," District Court Judge Dudley Bowen found that the list of invitees qualified as a "similar file" under Exemption 6. But indicating that the agency's burden to show an invasion of privacy was "onerous," Bowen observed that "disclosure of the redacted names would not constitute a clearly unwarranted invasion of personal privacy." Bowen pointed out that the fact that an individual's name was on the list showed that he or she was likely to attend the ceremony and that they probably had some connection to Boorda or the Navy. He noted that "these characteristics are hardly spectacular." He also found the consequences of disclosure minimal. He explained that "allowing disclosure may result in Plaintiff asking listed individuals whether they would be willing to discuss Admiral Boorda's life, personality, and career. This impact upon an individual's privacy interests is slight. Significantly, disclosing the names does not expose an individual's private thoughts or feelings. Rather, disclosure of the names simply shifts the control of personal information from the Department of the Navy to the individual. The individual may then choose whether to agree to or refuse an interview with Plaintiff. Neither result implicates privacy interests, so disclosure of the redacted names would not frustrate Congress's purpose in enacting Exemption 6."

Bowen found the public interest in disclosure was significant. He noted that "the Change of Command Ceremony was a highly publicized event conducted in the course of official Navy business. . .The invitation list provides a valuable cross-section of the stakeholders of the Office of the [Chief of Naval Operations] and Admiral Boorda. Redaction of the names adulterates any useful analysis of this information. The public has a significant interest in being informed about *all* the individuals who were invited to the Change of Command Ceremony, not only those that the Department of the Navy deems important." Bowen indicated that Sikes' proposed derivative use of the list to contact individuals was important as well. "Admiral Boorda's death possibly leaves a number of unanswered questions regarding the pressures facing one of the most powerful and influential roles in the United States Navy. Allowing disclosure of the names on the invitation list will help identify those individuals who may provide valuable insight into Admiral Boorda's character and offer context to the events and pressures that led to his death." He noted that "although this Circuit has not addressed this issue, it appears that consideration of derivative uses is appropriate in certain circumstances." He added that "defendants have failed to show any such 'demonstrably significant invasion' of personal privacy to outweigh these derivative uses, and valuable information may result from disclosure."

Bowen concluded Sikes was entitled to attorney's fees for both requests. Noting the different reasons the agency gave for denying access to and then releasing the records found in Boorda's vehicle, Bowen observed that "defendants' inconsistent, if not disingenuous, justifications for withholding the materials suggests an inference that they withheld the requested materials in bad faith." He pointed out that "these conflicting explanations suggest that Defendant withheld the requested materials in bad faith until Plaintiff instituted this action against them." (*Thomas W. Sikes v. United States Department of the Navy*, Civil Action No. 312-045, U.S. District Court for the Southern District of Georgia, Dublin Division, Dec. 6)

Views from the States…

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

Connecticut

A trial court has rejected Stephen Sedensky's appeal of an FOI Commission decision ordering disclosure of the 911 tapes from the Sandy Hook Elementary School shooting to the Associated Press. After the FOI Commission ruled against Sedensky, the State's Attorney for the Judicial District of Danbury, he appealed the Commission's decision, arguing that the 911 tapes were protected by several exemptions, particularly those concerning reports of child abuse and law enforcement records. But Superior Court Judge Eliot Prescott found Sedensky had failed to show that any of the exemptions applied. He noted that the child abuse exemption applied only where an individual charged with a child's care had been accused of abuse and not more broadly to situations where children were the victims of a crime other than child abuse. Prescott pointed out that "the 911 audio tape recordings [do not] constitute information relative to child abuse within the specific meaning of [the statute]." Prescott dismissed Sedensky's claims that the law enforcement exemptions applied. He observed that "even if the 911 callers are unknown to the public, nothing in the recordings or in the record below indicates that their safety may be endangered or that they would be subject to threat or intimidation if their identity was revealed." Prescott indicated that since the shooter was dead, no one was still being investigated for the crime. He pointed out that "although no party disputes that horrendous crimes were committed, the FOIA does not require that a criminal investigation be closed before disclosure is required." Prescott concluded that disclosure of the 911 tapes was clearly in the public interest and that there was no reason to delay their disclosure. He observed that "delaying the release of the audio recordings, particularly where the legal justification to keep them confidential is lacking, only serves to fuel speculation about and undermine confidence in our law enforcement officials." (*Stephen J. Sedensky III v. Freedom of Information Commission*, No. HHB CV 13-6022849-S, Connecticut Superior Court, Judicial District of New Britain, Nov. 27)

West Virginia

The supreme court has ruled that information concerning complaints of misconduct against state police officers is subject to disclosure after an investigation or inquiry has been completed and a determination has been made as to whether disciplinary action is authorized. The *Charleston Gazette* had requested records concerning misconduct complaints against state police officers. The State Police denied the request and the trial court upheld its decision based on a legislative rule providing confidentiality to some of the records, as well as the privacy, law enforcement, and internal memos exemptions. However, the supreme court, using a

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five-factor test developed in *Child Protection Group v. Cline*, 350 S.E.2d 541 (1986), that included the degree of the privacy invasion, the public interest in disclosure, the availability of the information from other sources, whether the information was given with an expectation of confidentiality, and whether it was possible to grant relief that would limit the invasion of privacy, found that much of the information could be disclosed. The court indicated that "conduct by a state police officer while the officer is on the job in his or her official capacity as a law enforcement officer and performing such duties, including but not limited to, patrolling, conducting arrests and searches, and investigating crimes does not fall within the Freedom of Information Act invasion of privacy exemption." Turning to the public interest factor, the court noted that "because the dissemination of public information by the press is an important cornerstone of a vivacious democracy, this factor weighs in the Gazette's favor." The court then observed that "clearly, the information sought to be disclosed in the present case was intended by the legislative rule to be confidential." But, the court concluded that "the rule is not dispositive of the issue, and the FOIA shall remain the proper analytical framework for issues of disclosure of public information." Relying on previous decisions concerning the disclosure of complaints against attorneys and physicians, the court explained that "after the investigation or inquiry into the complaint has been concluded and a determination made as to whether disciplinary action is authorized by the Superintendent, the public has a right to access the complaint, all documents in the case file, and the disposition, with the names of the complainants or any other identifying information redacted in accordance with the confidentiality requirements established by West Virginia Code of State Rules." Because the State Police had failed to provide sufficient information about the records requested, the supreme court sent the case back to the trial court for a determination consistent with its opinion. (*Charleston Gazette v. Colonel Jay Smithers*, No. 12-0811, West Virginia Supreme Court of Appeals, Nov. 26)

The Federal Courts…

Judge Barbara Rothstein has ruled that, although its initial search failed to locate responsive documents, U.S. Citizenship and Immigration Services conducted an **adequate search** for records concerning the asylum petition of Nina Abramyan and properly withheld the asylum interview under **Exemption 5 (deliberative process privilege)**. Abramyan requested her alien file from USCIS, which responded that it had no records. She appealed, arguing that since the U.S. Embassy in Moscow had told Abramyan that it would deny her visa application because she had filed a fraudulent asylum application in 1999, she must have an alien file with USCIS. She told the agency that she was the beneficiary of a pending visa application filed by her mother and provided the petition number for that application. USCIS searched again and found 184 records, disclosing 167 pages and withholding six pages containing the notes and assessment report of her asylum interview under Exemption 5. Abramyan first argued the agency's search was inadequate. But Rothstein noted that "USCIS does not explain why it was unable to retrieve Abramyan's A-file using the information he submitted in her initial FOIA request. Nevertheless, that issue is moot. Abramyan does not dispute that she ultimately received the documents responsive to her request, save the six pages USCIS withheld. Subsequent production can cure deficiencies in the initial search." She added that "that USCIS ultimately retrieved the documents after initially coming up empty does not evidence bad faith." Rothstein then found the six pages were properly protected under Exemption 5. She noted the agency characterized the Assessment to Refer as containing "'a brief factual distillation' of the asylum interview, along with the asylum officer's recommendation." She observed that "assessments of credibility and recommendations are 'quintessential deliberative information.'" Rothstein found the assessment was not a final decision. She rejected Abramyan's argument that factual material should be disclosed, pointing out that "even the factual material was deliberative." Abramyan argued the agency had not adequately described the content of handwritten notes being withheld. Rothstein observed that "the Court cannot require USCIS to describe exactly which portions of the interview the asylum officer selected to record, without defeating the purpose of the exemption. [The agency's] declaration suffices to

show that the selective summary of factual material is itself deliberative, and thus protected from disclosure." (*Nina Abramyan v. United States Department of Homeland Security*, Civil Action No. 12-01064 (BJR), U.S. District Court for the District of Columbia, Dec. 4)

A federal court in Virginia has ruled that the Labor Department improperly invoked **Exemption 5 (deliberative process privilege)** and **Exemption 7(E) (investigative methods and techniques)** to withhold information concerning the process for approving permanent labor certifications allowing foreign nationals to work in the United States. The Office of Foreign Labor Certification responded to David Gluckman's request by withholding 272 documents in full or with redactions under Exemptions 5 and 7(E). The court explained that Exemption 7(E) had a "relatively low bar for the agency to justify withholding." And that "the Government usually [meets the threshold for Exemption 7 coverage that records must be compiled for law enforcement purposes] by showing that the records at issue are involved with the enforcement of a statute or regulation within its authority and that the records were compiled for adjudicative or enforcement purposes." That being the case, however, the court then noted that "Defendant cannot show that OFLC has an enforcement mandate. Instead, OFLC refers any possible fraud or willful misrepresentation in connection with the permanent labor certification program to the DOJ, DHS, or other government entity, as appropriate, for investigation, and sends a copy of the referral to the Department of Labor's Office of Inspector General." The court added that 'the 272 relevant withheld documents are better characterized as compiled for audit purposes—the documents list audit criteria, itemize the procedures OFLC staff should take when processing applications with specific audit criteria present, and contain templates of audit notification letters. To construe these documents as 'compiled for law enforcement purposes' would improperly broaden the meaning of the term." Having found Exemption 7(E) inapplicable, the court found that Exemption 5 did not cover the documents either. The court pointed out that "OFLC has not met its burden to show the withheld documents were not official policies or that they were subject to continuing debate. . .OFLC consistently characterizes these documents as policy, criteria, or templates used by lower level employees in order to assess PERM applications." The court rejected Gluckman's argument that the agency had not conducted an adequate search and had excluded potentially responsive records. Instead, the court found the agency had properly interpreted the scope of Gluckman's request and that categories of records not searched by the agency did indeed fall outside the scope of the request. (*David Elliott Gluckman v. United States Department of Labor*, Civil Action No. 3:13-CV-169, U.S. District Court for the Eastern District of Virginia, Richmond Division, Nov. 26)

A federal court in Arizona has ruled that the Energy Department properly withheld information about the wages paid by a contractor to individual employees for work on an Energy Systems Integration Facility construction project in Golden, Colorado under **Exemption 4 (confidential business information)**. Responding to a request from Torres Consulting and Law Group, DOE redacted personal information under **Exemption 6 (invasion of privacy)** and individual wage information under Exemption 4. While accepting the redactions made under Exemption 6, Torres challenged those made under Exemption 4. The agency argued that discourse of individual wage data "would be a competitive disadvantage because the hourly labor rate for the ESIF project is set by the government, meaning the subcontractors' labor production costs could be calculated by multiplying the government's labor rate by the hours worked" and that disclosing the data "would allow competitors to underbid the contractors when competing for work because labor production rates are a significant element of a contractor's price." Torres argued disclosure of the wage data was not enough to allow competitors to underbid other contractors. The court, however, disagreed, noting that Torres' affidavits "fail to specifically contradict the central role labor production rates play in bid estimates." The court added that "that the DOE has released substantial information to Torres that is useful in evaluating whether Davis-Bacon [the federal prevailing wage statute] was complied with is also significant." Finding the agency had

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met its burden to show potential competitive harm, the court observed that "while the exact extent of that competitive harm is debatable, the precise amount need not be determined in this action. Additionally, disclosing the requested wage and hour information could hurt the DOE by impacting the type and amount of bids received in the future and harm the contractors' employees by altering the wages offered on future contracts." (*Torres Consulting and Law Group, LLC v. Department of Energy*, Civil Action No. CV-13-00858-PHX-NVW, U.S. District Court for the District of Arizona, Nov. 27)

A federal court in California has rejected Phillip Mosier's quixotic attempt to force the CIA to admit that it has records pertaining to him. Mosier asked for records about himself and indicated he had been interviewed by the CIA in 1966. In response, the agency admitted that it once had a security file on him, but that it had been destroyed in 1996. Otherwise, it told Mosier it would neither confirm nor deny the existence of records concerning him because the existence of any records was protected under both **Exemption 1 (national security)** and **Exemption 3 (other statutes)**. Although the agency claimed that it was protecting sources and methods, Mosier argued that the admission that records about him existed did not fit within the definition of sources and methods. The court disagreed, noting that "here, it is logical and plausible that either confirming or denying the existence or nonexistence of records reflecting a classified connection between Plaintiff and the CIA could reveal intelligence methods, intelligence sources, and ongoing intelligence activities. Plaintiff is incorrect in asserting that the question of whether the CIA possesses responsive records does not fall within any category of classifiable information." The court found the same result when assessing the agency's Exemption 3 claim. "Requiring the CIA to disclose whether a classified relationship between Plaintiff and the Agency exists may reveal an intelligence source. In addition, inconsistent use of the Glomar Response would be incompatible with the CIA's efforts to keep its sources and methods free from unwarranted disclosure. In light of the Director's extensive power to protect these sources and methods, this Court concludes that the CIA's response to Plaintiff's FOIA request was proper under FOIA Exemption 3." The fact that the agency admitted to once having a security file on Mosier did little to help his case. The court noted that "plaintiff cannot demonstrate that the security file contained the same or even similar information as any classified information that may (or may not) exist and whose existence is protected by the Glomar Response." Accepting the adequacy of the Glomar response, the court pointed out that "inconsistent use of Glomar could. . .be interpreted as a de facto admission by the CIA that classified records exist. Here, the [agency's] declaration and its explanation regarding the CIA's use of Glomar Responses and the potential harm in disclosing the existence of classified relationships is logical and plausible." (*Phillip Mosier v. Central Intelligence Agency*, Civil Action No. 2:13-cv-00744-MCE-KJN, U.S. District Court for the Eastern District of California, Nov. 27)

Judge Ellen Segal Huvelle has ruled that the EOUSA improperly cited **Exemption 3 (other statutes)** to withhold information about the time at which a grand jury convened. James Murphy submitted two requests to EOUSA. His first request asked for time dates on which a grand jury convened to investigate two separate criminal cases, the name of the convening judge, the date of the indictments, the date the jury was discharged, and the starting and ending date of the grand jury's term. His second request asked for a copy of the indictments. When EOUSA failed to respond to either request, Murphy filed suit. The agency then provided the data he requested, but withheld the convening time of the grand jury under Exemption 3 as well as portions of the indictment under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. EOUSA supported its citation to Rule 6(e) on grand jury secrecy by indicating that the times the grand jury convened was being withheld "in order to protect the identity of witnesses and the secrecy of the grand jury proceedings." Huvelle noted that "this obscure statement fails to explain how releasing the requested information could possibly reveal a secret aspect of the grand jury investigation, and arguably is contradicted by defendant's release of the dates the grand jury convened and returned an indictment. Defendant's

declaration simply fails to demonstrate a 'logical connection between the [withheld grand jury] information and the claimed exemption.'" Turning to the Exemption 7(C) claim, Huvelle pointed out that "it is established that because of substantial privacy concerns, exemption 7(C) 'categorically' exempts from disclosure the identities of individuals mentioned in law enforcement files, such as here, absent a showing, not attempted here, of an overriding public interest." (*James Murphy v. Executive Office for United States Attorneys*, Civil Action No. 13-0573 (ESH), U.S. District Court for the District of Columbia, Dec. 6)

Judge Colleen Kollary-Kotelly has ruled that Jeffrey North has not provided new evidence that would cause her to reconsider her previous finding that the DEA did not have any records connecting publicly-identified informant Gianpaolo Starita to North. While the agency had originally issued a *Glomar* response neither confirming nor denying the existence of any records pertaining to Starita, Kollar-Kotelly had agreed with North that the agency had confirmed Starita's status as an informant by his testimony at North's trial. But after Kollar-Kotelly ordered the agency to conduct a search, it indicated that it found no records. North argued on reconsideration that the agency had told Kollar-Kotelly after the fact that its original position claiming exemptions was incorrect and that the agency instead had no records. Kollar-Kotelly noted that "like the plaintiff, the Court recognized that the DEA's [second motion] had been hastily assembled and largely cut and pasted from its prior renewed motion for summary judgment without taking care to adapt the pleading to the Court's rejection of the DEA's *Glomar* response. From the Court's perspective the Third Declaration was the key document to rely on because it represented the actual agency position, sworn under oath by the individual who was involved in the search. Thus, the Court sought clarification of the discrepancy between the 'no records' assertion in the Third Declaration and the agency's continued discussion of FOIA exemptions in its pleadings in order to confirm the Court's understanding that discussion of the FOIA exemptions was a mistake and that the Third Declaration was indeed the agency position." Kollar-Kotelly indicated North was aware of the discrepancy and had been able to address it. North also claimed the agency had failed to use a court transcript he had provided to show that the agency had records on Starita. She observed that "the adequacy of the DEA's search is not dependent on a search of the transcripts or a search for information matching the transcripts; the transcripts are only relevant to the second order question of whether the DEA has the right to withhold any information it found that was responsive to the Plaintiff's request. As the DEA found no documents responsive to the Plaintiff's request, the transcripts became irrelevant." (*Jeffrey North v. United States Department of Justice*, Civil Action No. 08-1439 (CKK), U.S. District Court for the District of Columbia, Dec. 6)

The Ninth Circuit has upheld the district court's award of **attorney's fees** to Ronald Yonemoto after seven years of litigation. The appeals court agreed that records disclosed shed light on the Department of Veterans Affairs' treatment of personnel and that any personal interest Yonemoto had in the documents was outweighed by the public interest in disclosure. The court noted that "in light of the VA's continuing refusal to disclose the requested documents in compliance with FOIA, during the seven years of this litigation, Yonemoto might well have abandoned the case 'absent the high probability that fees and costs of suit would be awarded against the intransigent agency.'" However, the court agreed with the agency that the district court's reference to the agency's position as being "not completely reasonable" or "not entirely reasonable" misrepresented the standard. The court pointed out that "our cases do not require that the government's withholding be 'completely' or 'entirely' reasonable, as in the sense that all of its bases for withholding were reasonable. We require only that 'the agency's decision. . .be based upon legal authority that reasonably supports its position that the documents should be withheld.' If the district court meant to say otherwise, then it applied the wrong standard." Noting that it could uphold the decision on any basis supported by the record, the court indicated that "Yonemoto has incurred significant legal fees responding to arguments that the VA

either knew were tenuous or would ultimately abandon, and supporting his claims to documents that the VA would ultimately disclose." But the court also approved of the trial's court's lowering of Yonemoto's award. The court observed that "the district court did not abuse its discretion in reducing Yonemoto's fee award to reflect his limited success." (*Ronald M. Yonemoto v. Department of Veterans Affairs*, No. 12-16662 and No. 12-16793, U.S. Court of Appeals for the Ninth Circuit, Dec. 6)

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