Volume 39, Number 5
February 27, 2013

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: In a recent online "fireside hangout" hosted by Google, President Barack Obama defended his administration's record on transparency against criticisms that the administration had been too secretive on issues like the use of drones. Obama said that "this is the most transparent administration in history" and pointed to the routine release of White House visitors' records and the fact that all new laws and rules are put online. . .The Supreme Court heard oral arguments Feb. 20 in McBurney v. Young, a case challenging Virginia's citizens-only limitation in its Freedom of Information Act. McBurney and co-plaintiff Roger Hurlbert argued that the privileges and immunities clause in the U.S. Constitution prohibits states from discriminating on the basis of citizenship when it comes to access to state records. Many members of the Court seemed skeptical. Chief Justice John Roberts indicated that the plaintiffs' claim did not seem weighty enough. He observed that "it seems to me it's a bit of a stretch to say somebody gathering records under FOIA" is engaged in an activity protected by the privileges and immunities clause. Justice Antonin Scalia asked: "Is it the law that the state of Virginia cannot do anything that's pointless? Only the federal government can do stuff that's pointless?"

Court Rules Workplace Report Protected by Exemption 5

In a ruling that provides some interesting observations concerning what rights under FOIA and the Privacy Act are transferrable to others, Judge Rosemary Collyer has affirmed the EPA's decision to invoke Exemption 5 (deliberative process privilege) to withhold the report of its investigation of Dr. Richard Hammer's complaints of a hostile work environment at the agency's Western Ecology Division in Corvallis, Oregon.

Hammer joined the EPA in 2007 as a supervisory life scientist. In October 2009, he complained to Dr. Steven Hedtke, his second-line supervisor, of a hostile work environment that was affecting his health and asked for reassignment. EPA hired Dr.

Peter Maida, a contractor, to conduct a fact-finding investigation into Hammer's complaint. In December 2009 while Hammer was on medical leave, Hedtke informed him of the results of Maida's investigation and indicated that he could not find support for the existence of a hostile work environment under EEOC guidelines but that there was evidence of communication and management style differences which had led to the breakdown of effective communications. Hedtke said he was considering such options as mediation, training, or job reassignment. Hammer made two FOIA requests and one Privacy Act request for Maida's contract and the report. The agency disclosed the contract, but withheld the report under Exemption 5. As to Hammer's Privacy Act request, the agency explained the report was not maintained in a system of records subject to the Privacy Act.

Hammer filed an employment discrimination complaint with the agency in June 2011. He was terminated in November 2011. He then filed a complaint with the Merit Systems Protection Board. He settled both complaints in January 2012 and agreed not to pursue any further action. In return, EPA changed Hammer's discharge to resignation. Public Employees for Environmental Responsibility filed a FOIA and PA request with the agency for the Maida report in December 2011, indicating the request was made on behalf of both the organization and Hammer. The agency again withheld the report under Exemption 5. PEER then filed suit.

Collyer first explained that Hammer's legal rights were severely curtailed by the agreement he had signed. She noted that "Dr. Hammer cannot sue EPA because he settled all claims against the agency on January 31, 2012—*after* PEER submitted the FOIA/PA request. . .Any claims advanced by Dr. Hammer must be dismissed, including all PA claims made by him or PEER. The only claim properly before the Court is PEER's FOIA request for the Maida Report." She pointed out that Hammer's settlement agreement with the EPA covered any actions "filed by Dr. Hammer in the past *or* future" and that "Dr. Hammer expressly promised not to institute any appeal, complaint, grievance, claim, or civil action in the future. Inasmuch as he had filed his own FOIA/PA requests for the Maida Report, there can be no doubt that an identical FOIA/PA claim or civil suit by Dr. Hammer was covered and precluded by the broad language of the settlement agreement. Dr. Hammer is a highly educated man, and he was represented by counsel. A settlement agreement is a contract, and Dr. Hammer is bound by the contract he signed. The court has no hesitancy in holding Dr. Hammer to the bargain he struck."

Although Hammer had provided PEER a waiver so that the group could obtain his personal information, Collyer explained that "while Dr. Hammer may, and did, provide written consent allowing EPA to disclose records pertaining to him to a third party, such as PEER, only Dr. Hammer would have a cause of action under the PA." She observed that PEER "has no rights under the Privacy Act to records concerning Dr. Hammer." This was because, she explained, "an 'individual' under the PA is 'a citizen of the United States or an alien lawfully admitted for permanent residence.' Unlike FOIA, the PA extends no rights to organizations or corporations. Corporations and organizations lack standing to sue under the PA, which creates a cause of action for 'individuals' as defined in [the statute]."

After reviewing the report *in camera*, Collyer indicated that Exemption 5 applied to the entire report except for the first three sections, which she said "represent 'purely factual material' that can be severed 'without compromising' the rest of the report." As to the rest of the report, Collyer noted that "there is no 'factual summary' discussed regarding Dr. Hammer's allegations, they are considered in more analytical contexts, tied inextricably to Dr. Maida's opinions and discussions." She pointed out that "the lack of a final decision is not dispositive when an agency can establish that there was a deliberative process of which the withheld material was a part. EPA has clearly established in this record that it was considering options to reduce the hostility and other problems Dr. Hammer perceived in his workplace and that Dr. Maida's Report contributed to that process."

PEER argued that there were no internal discussions between subordinates and superiors. Collyer dismissed the claim, observing that "this argument ignores reality: Dr. Maida interviewed employees [at the WED], subordinates and superiors alike, as a direct agent of Dr. Hedtke and as a non-EPA person to elicit more candor. Dr. Hedtke used this procedure for the protection of Dr. Hammer, who had alleged that subordinates and superiors were complicit in creating that alleged hostile work environment." (*Public Employees for Environmental Responsibility v. U.S. Environmental Protection Agency*, Civil Action No. 12-748 (RMC), U.S. District Court for the District of Columbia, Feb. 26)

Views from the States…

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

Florida

A court of appeals has ruled that the University of Florida improperly invoked the exemption for security plans to withhold the location of a facility housing primates. Reversing the trial court's finding that the University's withholding was proper, the appeals court noted that "the University effectively argues that it can shield the location of certain public facilities when it determines that the nature of the public activities occurring at the facilities subjects them to physical threats. Such a reading is not compatible with the admonition that public records exemptions are to be narrowly construed to provide for public access." The court observed that "the University will need to seek an exemption to protect the location of the animal research facilities at issue in this case. In so holding, we do not rule on whether an exemption for the location of such facilities would be a prudent policy, but only rule that the University must go to the legislature for such an exemption." (*Camille Marino v. University of Florida*, No. 1D12-1688, Florida District Court of Appeal, First District, Feb. 26)

Kentucky

The Attorney General has ruled that the City of Newport violated the Open Records Act when it refused to provide accident reports to Capitol Radio Traffic Systems because it contended Capitol Radio intended to use the information for commercial purposes. The AG noted that "although the City of Newport intimates that Capitol Radio's intended use of the requested accident reports may be a commercial one, its denial was postulated on the belief that Capitol Radio is not a newsgathering organization. Given the broad definition of the term. . .and the court's hesitation to interpret [the provision allowing media access for accident reports] in such a way as to derogate a free press, we believe Capitol Radio must be accorded [media] status. Capitol Radio obtains accident reports with the intent to publish or disseminate them to the public, albeit through unconventional means. It remains for the City of Newport to prove its suspicion that Capitol Radio's intended use of the reports is a commercial use, thus justifying its refusal to release the reports." (13-ORD-025, Office of the Attorney General, Commonwealth of Kentucky, Feb. 15)

New York

A court of appeals has ruled that the New York City Department of Education must disclose a complaint filed by schoolteacher Michael Thomas that the Department did not prepare a comprehensive educational plan as required under the No Child Left Behind Act with appropriate redactions. The court noted that "the underlying complaints pertain to Manhattan Center for Science and Mathematics administrators'

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performance of their official duties when using and applying federal funds, and in constructing and implementing the [Comprehensive Educational Plan]. Accordingly, this matter should be remanded to [the trial court] for an in camera inspection of the documents to determine if redaction could strike an appropriate balance between personal privacy and public interests and which material could be properly disclosed. The court should also determine whether portions of the documents may be exempt from disclosure as intra- or inter-agency records that are not statistical or factual data." (*In re Michael P. Thomas v. New York City Department of Education*, New York Supreme Court, Appellate Division, First Department, Feb. 19)

A court of appeals has upheld the trial court's decision allowing the Teachers' Retirement System to withhold the names of retirees from an updated database requested by the Empire Center for New York State Policy. Although the Empire Center argued that it had received the information in the past, the appeals court indicated that a 1983 Court of Appeals decision found that the names and addresses of public employees in public employee retirements systems were exempt. The Empire Center argued that the request in the Court of Appeals decision was "for *both* the names and the addresses of the retiree, whereas the request here was for the names only." But the appellate court noted that "however, if only the addresses of the retirees were exempt from disclosure, the Court could have directed the agency to disclose the names, but not the addresses. Instead, the Court of Appeals held that [the FOIL exemption] foreclosed any relief to the petitioners therein." (*In the Matter of Empire Center for New York State Policy v. New York State Teachers' Retirement System*, New York Supreme Court, Appellate Division, Third Department, Feb. 21)

The Federal Courts…

The Seventh Circuit has ruled that Justice Department attorneys in the Environmental Enforcement Section and the Environmental Defense Section of the Environment and Natural Resources Division are not considered adversaries for purposes of claiming **Exemption 5 (privileges)**. In litigation over a proposed consent decree allocating the liability for cleaning up the Lower Fox River in Wisconsin, Menasha Corporation, one of the potentially liable parties, submitted a FOIA request to Justice for records concerning the discussions between attorneys of the two sections over how the government concluded that its potential liability was a mere $4.5 million. Menasha claimed that, because the Enforcement Section was representing the EPA in its attempt to enforce the consent decree and the Defense Section was trying to limit the government's potential liability, their interests in the litigation were adverse and their discussions were not covered by the attorney work-product privilege. The district court agreed and ordered the agency to turn over 440 documents. The Seventh Circuit, however, reversed. Pointing out that "the two sections have no autonomy," Circuit Court Judge Richard Posner noted that "the Associate Attorney General, who approved the proposed consent decree, is not a judge adjudicating a suit between the EPA on the one hand and the Corps of Engineers and a host of other federal agencies (including, confusingly enough, the EPA) on the other hand. The Superfund suit was brought not by or against (or by and against) a medley of separate federal agencies conceived of as parties. The only federal party was the United States, a single party represented by a single legal representative, the Justice Department." He observed that "information in the nature of attorney work product exchanged among the Department's lawyers is not information exchanged among adverse parties and is therefore privileged." (*Menasha Corporation v. United States Department of Justice*, No. 12-1720, U.S. Court of Appeals for the Seventh Circuit, Feb. 20)

A federal court in Virginia has ruled that the FTC did not conduct an **adequate search** for records concerning its interactions with the alcoholic beverage industry and that it further failed to justify many of its claims under **Exemption 5 (privileges)**. The law firm of Carter, Fullerton & Hayes, which represented a non-

profit engaged in oversight of the FTC's regulation of alcohol, had already litigated over three previous disputed requests to the FTC. In May 2011, the law firm submitted an extensive multi-part request and included a list of agency offices which it suspected would have responsive records. The agency first searched using the name of the law firm's lead attorney, John Carter and conducted a further search of its case management database using search terms supplied by the law firm, but did not search its Bureau of Economics, even though the request had indicated it expected responsive documents would be found there. The agency identified more than 5,000 pages of responsive records and withheld more than 1,600 of them under Exemption 5. The law firm filed an administrative appeal and asked the agency to provide a more detailed explanation of its claims. The agency refused to provide such a list, noting that based on relevant case law it was not required to do so, and upheld its initial denial. The law firm then sued. The court agreed with the law firm that the agency's search was inadequate. The court pointed out that, although many of the responsive records indicated they had originated in the Bureau of Economics, that office had not been searched. The court observed that "FOIA requires the Court apply a reasonable standard, rather than simply looking to the typical or most efficient method of conducting a search. As such, a reasonable FOIA paralegal, along with the FTC's Office of General Counsel, should have reasonably anticipated that response records would be found in the Bureau of Economics." The court also questioned why it took the agency more than 15 months to finish processing the request. The court noted that "the fact that this was the fourth request of its kind by Plaintiff, however, should make the agency's compliance with the request more efficient." As to the Exemption 5 claims, the court agreed with the law firm that the agency had improperly claimed the consultant's exception to withhold records that did not qualify under the inter- or intra-agency threshold. The court also found the agency's **segregability** analysis lacking. The court indicated that "despite Plaintiff's inability to rebut Defendant's claim that segregability was proper for each document, the burden remains on the agency to show that it properly fulfilled the requirements under FOIA. . .As a matter of law, the FTC has failed to satisfy the Court that no genuine issues remain in terms of the segregability of the withheld documents. Therefore, an *in camera* review of the documents listed in the *Vaughn* Index is appropriate." (*Carter, Fullerton & Hayes v. Federal Trade Commission*, Civil Action No. 1:12-cv-448, U.S. District Court for the Eastern District of Virginia, Alexandria Division, Feb. 21)

Judge Emmet Sullivan has ruled that the State Department cannot withhold records contained in its Consular Lookout and Support System database merely because of their location. Robert Darnbrough, a Canadian citizen, requested information on his renunciation of U.S. citizenship in 2003. State withheld a record found in the CLASS database pertaining to Darnbrough's application to Customs and Border Protection for a NEXUS card allowing him expedited processing when traveling between the U.S. and Canada. State withheld the record under 8 U.S.C. § 1202(f), contending it was visa-related. The agency argued that "because [the record] was retrieved from a database used to determine visa eligibility, it is therefore exempt from disclosure in its entirety under Section 1202(f)." The agency asserted that "the *purpose* for which the information was retained, rather than its content, is what determines whether the information is exempt." The agency also claimed that 1202(f) established a policy of confidential treatment for visa records. Sullivan disagreed. He pointed out that "viewing Section 1202 as a whole, it is clear that the statute relates only to the issuance and refusal of visa applications. . .It does not concern other aspects of visas or immigration, such as visa revocations or other adjustments or changes in one's immigration status. . .Section 1202(f) cannot be extended to cover materials unrelated to a visa issuance or denial simply because those documents are contained in a database among other documents that may pertain to visa issuances and denials." Sullivan indicated that his holding was narrow. He observed that "because the Department has conceded that this case does not involve the issuance or refusal of a visa or permit, and because the document in question does not

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relate to the issuance or refusal of a visa or permit, it is not exempt from disclosure simply because it is found in a database that also holds information regarding the issuance and refusal of visas and permits." (*Robert Darnbrough v. U.S. Department of State*, Civil Action No. 11-1862 (EGS), U.S. District Court for the District of Columbia, Feb. 20)

Judge Richard Roberts, while upholding the **adequacy of the search** conducted by the Secret Service and other agencies in response to Donald Friedman's request for information about direct-energy weapons, with which he contended the government had been torturing him for years, has also found that many of the exemption claims made by various agencies are not sufficiently supported. Friedman made his requests in 2006 and filed suit in 2007. As a result, many of the agencies' affidavits supporting their exemption claims dated back to 2007. Friedman claimed that because the agencies had tortured him for years their affidavits supporting their search could not be trusted. But Roberts noted that "the Secret Service's supporting declarations are accorded a presumption of good faith, and plaintiff's conjecture as to covert activity within the agency to prevent FOIA disclosures does not rebut his presumption." Roberts also dismissed Friedman's suggestion that the agency search the computers of various vehicles equipped with direct-energy weapons. The Secret Service said it had no such vehicles and Roberts observed that "vehicles and other equipment are not records under the FOIA, and the Secret Service was under no obligation to search them or to search their contents." Roberts approved the exemption claims of both the Secret Service and the Air Force concerning their withholding of several technical reports under **Exemption 1 (national security)**. He found the agencies' **Exemption 2 (internal practices and procedures)** claims were no longer valid since *Milner*. Although Raytheon Company had claimed that several pages of records that originated with the company were protected by **Exemption 4 (confidential business information)**, Roberts indicated that "while Raytheon articulates a rationale for withholding information under Exemption 4, the Secret Service offers no explanation of its own reasons for withholding information from the Raytheon records under any of the exemptions. For this reason, the Court defers consideration of all the exemptions claimed with respect to the Raytheon documents." Several agencies had withheld any personal information appearing in the records under **Exemption 6 (invasion of privacy)**. Roberts rejected such a broad application. He pointed out that "plaintiff's request is designed primarily to obtain information about directed energy weapons and electromagnetic radiation-emitting devices. He does not seek information about a particular individual, and none of the responsive records was retrieved using the name of or any identifying information about a particular person. In this case, information about third parties happens to have been found in the responsive records and does not appear to contain personal or intimate information about these third parties. For example, the names of government employees and servicemembers and their work telephone numbers are withheld. Such information ordinarily is not considered 'similar files' for purposes of Exemption 6. Nor is correspondence subject to redaction under Exemption 6 'solely because it identifies government employees.'" Roberts also questioned the agencies' **Exemption 7 (law enforcement records)** claims. Acknowledging that a law enforcement agency's claims of Exemption 7 were entitled to deference, he noted that "deference does not amount to blind acceptance of the agency's assertions. This is not the typical case where the requester sought records about his own criminal prosecution. . .Here it appears that the Secret Service relies on its status as a law enforcement agency to withhold records that it deems 'of a research nature,' and thus may not be related directly to a law enforcement purpose." As to the Justice Department, Roberts indicated that "without a fuller description of the records at issue and more than a conclusory statement of its decision to withhold information, the DOJ fails to demonstrate that the information withheld falls within the scope of Exemption 7 generally or that it is exempt from disclosure under **Exemption 7(E) (investigatory methods and techniques)** specifically." (*Donald Friedman v. United States Secret Service*, Civil Action No. 06-2125 (RWR), U.S. District Court for the District of Columbia, Feb. 14)

Judge Rosemary Collyer has ruled that a request submitted to several agencies by Freedom Watch for records related to waivers granted to allow trade with Iran despite U.S. sanctions is invalid because it was not sufficiently specific. Freedom Watch's request contained 63 categories of records and asked for "all" records that "refer or relate" to each category. After several agencies denied Freedom Watch's request for expedited processing and a fee waiver, as well as indicating the request was too broad, Freedom Watch filed suit. Freedom Watch claimed its request was specific enough and that agencies were complaining about a handful of categories to avoid responding. Collyer disagreed. She noted that "the requests failed to identify the documents sought with any modicum of specificity and were thus fatally overbroad and burdensome." Pointing out that one category pertained to how Iran related to American politics or elections, Collyer observed that "Freedom Watch refused to discuss narrowing its requests, leaving unanswered how broadly it thinks an objective agency professional should construe the terms 'context of American politics *and* elections' and 'context of American politics *or* elections.'" She indicated that "with all the contested requests, neither time limitation nor subject matter of such communications is suggested." Before Collyer, Freedom Watch offered to work with the agencies to narrow its request. But she noted that "its belated realization that its requests may have been too broadly framed is not relevant to the question before the Court: the sufficiency of the requests submitted to the Defendant Agencies and challenged for insufficient (or no response) in the Complaint. Freedom Watch's offer to cut the scope of its requests is insufficient to avoid dismissal; a contrary result would overlook agency administrative procedures for that very purpose and encourage litigating by crying wolf, which Freedom Watch did here." She concluded that "the FOIA requests submitted by Freedom Watch to the Defendant Agencies were infirm from the beginning. Thus Freedom Watch never submitted a valid FOIA request to any of the Defendant Agencies. The requests were not valid because they did not describe the records sought sufficiently to allow a professional employee familiar with the area in question to locate responsive records." (*Freedom Watch, Inc. v. Department of State, et al.*, Civil Action No. 12-314 (RMC), U.S. District Court for the District of Columbia, Feb. 27)

Judge Robert Wilkins has ruled that the Interior Department properly narrowed Rosemary Hainey's FOIA request for a listing of departmental job vacancies based on a Department of Energy spreadsheet Hainey provided Interior as containing the information she sought and that the agency properly rejected the portion of Hainey's request asking for internal communications on hiring reform as too burdensome. The Department initially told Hainey it would cost more than $100,000 to compile the information on job vacancies. Although the agency wrote to Hainey at the address she had furnished, she did not receive it and did not learn about the agency's prior response until she filed an administrative appeal. After considerable back and forth, the agency agreed to compile the data in a spreadsheet similar to that used by the Energy Department. Although Hainey pointed out that the agency was not obligated to create a record to respond to a FOIA request, she accepted the agency's solution as satisfactory. However, she rejected the agency's suggestion that it provide her with the conclusions of the Department's 2009 hiring reform team instead of processing two years worth of potentially responsive emails of the 25 employees who made up the team. Wilkins found that the agency properly responded to the job vacancy part of the request when it agreed to provide Hainey with the spreadsheet modeled after the Energy Department's response. Wilkins pointed out that "even if Hainey were potentially arguing that the Department should produce additional records in response to this portion of her request—above and beyond the extensive spreadsheets produced by the Department—this argument fails. The Department fully complied with Hainey's modified request, and she cannot now argue that she is entitled to additional records that fall outside the scope of the request as she narrowed it." He indicated that "Hainey continues to insist that the Department should be required to produce the *full scope* of records sought through her original 'hiring reform' request." He observed that "the Department has demonstrated that responding to the full scope of Hainey's original 'hiring reform' request would require the Department 'to locate, review, redact, and arrange for inspection of a vast quantity of material.' Hainey does not argue otherwise—indeed,

she altogether fails to respond to the Department's burdensomeness arguments. She simply asserts that the Department efforts as to her 'vacancy announcement' request 'are not factors to determine whether it satisfied the unmodified portion of [her] FOIA request'—the portion related to 'hiring reform' efforts. That may be so. But that argument says nothing about whether the Department can satisfy her 'hiring reform' request absent an unreasonably burdensome search and review process." (*Rosemary McBride Hainey v. United States Department of the Interior*, Civil Action No. 11-1725 (RLW), U.S. District Court for the District of Columbia, Feb. 25)

In Memoriam

Privacy expert Alan Westin, a professor of public law and government at Columbia University for nearly 40 years, died Feb. 18. In his landmark 1967 book "Privacy and Freedom," he championed a definition of privacy that focused on an individual's right to control how much personal information he or she reveals to others and how that information is shared.

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