Volume 39, Number 7
March 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: The House Oversight and Government Reform Committee has passed FOIA amendments sponsored by Committee Chair Rep. Darrell Issa (R-CA) and ranking minority member Rep. Elijah Cummings (D-MD). The "FOIA Oversight and Implementation Act of 2013" (H.R. 1211) would codify the foreseeable harm test by placing it at the beginning of subsection (b), meaning it would be applicable to all exemptions. The bill also requires agencies to update their FOIA regulations, post any records that are the subject of three or more requests online, and post more information affirmatively. The amendments require the Office of Government Information Services to submit its annual report directly to Congress without any intermediate consideration by OMB. The bill expands agencies' reporting requirements and requires the Attorney General to provide a report about FOIA litigation. . .The Committee also passed the "Federal Advisory Committee Act Amendments of 2013" (H.R. 1104), sponsored by Cummings, Rep. Lacy Clay (D-MO) and Rep. Gerry Connolly (D-VA). The bill would mandate disclosure of information about advisory panel membership and selection processes, require reporting of conflict-of-interest waivers granted to members, and close a loophole in FACA by clarifying that disclosure and conflict-of-interest provisions apply to subcommittees as well as full committees.

D.C. Circuit Sets Limits on Use of *Glomar* Response

The D.C. Circuit has decided that the Alice in Wonderland-like nature of *Glomar* responses allowing intelligence agencies to refuse to confirm or deny the existence of records even when their existence is widely known has some limitations. Ruling against the CIA's use of a *Glomar* response concerning whether or not it had records indicating that it had an interest in the use of drones for targeted killings, Chief Circuit Court Judge Merrick Garland noted that "the CIA has proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones.

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There is no doubt, however, that such disclosure would reveal whether the Agency 'at least has an intelligence interest in drone strikes.' The question before us, then, is whether it is 'logical or plausible' for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency 'at least has an intelligence interest' in such strikes. Given the extent of the official statements on the subject, we conclude that the answer to that question is no."

The ACLU had submitted a multi-part request to the CIA pertaining to drone strikes. The agency issued a *Glomar* response, claiming that to confirm or deny the existence of such records would reveal information protected under both Exemption 1 (national security) and Exemption 3 (other statutes). The district court agreed and held that "the CIA was not required to confirm or deny that it had any responsive records, let alone describe any specific documents it might have or explain why any such documents were exempt from disclosure." The ACLU appealed the district court's decision to the D.C. Circuit.

Garland first noted the appeal concerned the intersection of two lines of FOIA cases—those cases involving *Glomar* responses allowing agencies to refuse to identify any records, and those cases involving official acknowledgement of information by the government, which, if proved, would vitiate the use of a *Glomar* response. Garland explained that "the plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect."

Garland then pointed out that the CIA was claiming that it could not acknowledge whether it had any interest in drone strikes. He indicated that "the CIA did not justify its *Glomar* response by contending that it was necessary to prevent disclosing whether or not the *United States* engages in drone strikes. Rather. . .the response was justified on the ground that it was necessary to keep secret whether the *CIA itself* was involved in, or interested in, such strikes." He added that "nor was the CIA's *Glomar* response limited to documents about drones operated by the Agency. Rather, the CIA asserted and the district court upheld a sweeping *Glomar* response that ended the plaintiffs' lawsuit by permitting the Agency to refuse to say whether it had *any documents at all* about drone strikes."

The ACLU pointed out that both President Barack Obama and his counterterrorism advisor John Brennan had publicly acknowledged that the U.S. used drone strikes. Although Garland admitted that the CIA itself had not publicly acknowledged its involvement in drone strikes, he explained that public acknowledgement could occur "where the disclosures are made by an authorized representative of the agency's parent." He indicated that "a disclosure made by the President, or by his counterterrorism advisor acting as 'instructed' by the President, falls on the 'parent agency' side of that line."

"Given these official acknowledgements that the United States has participated in drone strikes," Garland wrote, "it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes. The defendant is, after all, the Central *Intelligence* Agency. And it strains credulity to suggest that an agency charged with gathering intelligence affecting national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself." Adding to this weight, were public comments made by former CIA Director Leon Panetta. Garland said "it is hard to see how [Panetta] could have made his Agency's knowledge of—and therefore 'interest' in—drone strikes any clearer."

Although public acknowledgement of drone strikes was not an acknowledgment of the existence of agency records on the subject, Garland pointed out that "the only reason the Agency has given for refusing to disclose whether it has documents is that such disclosure would reveal whether it has an interest in drone strikes; it does not contend that it has a reason for refusing to confirm or deny the existence of documents that

is independent from its reason for refusing to confirm or deny its interest in that subject. And more to the point, as it is now clear that the Agency does have an interest in drone strikes, it beggars belief that it does not have documents relating to the subject."

Garland observed that "the *Glomar* doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. In this case, the CIA asked the courts to stretch that doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible."

In an interesting comment on how courts should view similar litigation pending in a different circuit, Garland noted the CIA had now admitted that it possessed records on drone strikes in *New York Times v. Dept of Justice*, WL 50209 (SDNY, Jan. 3, 2013), a district court decision in New York upholding the agency's exemptions claims currently on appeal to the Second Circuit. Garland pointed out that in the New York litigation "the CIA said it did not want to file a *Vaughn* index at all, but instead submit what it called a 'no number, no list' response—acknowledging that it had responsive documents, but declining to 'further describe or even enumerate on the public record the number, types, dates, or other descriptive information about these responsive records.' Although the CIA's New York filings speak as if the notion of a 'no number, no list' response is well-established, it has not previously been considered by this court. Indeed, at the time of those filings, there were only two previously reported instances of such a response. . ." Although the ACLU argued before the D.C. Circuit that the agency should not be allowed to use the "no number, no list" response, Garland indicated the CIA had not made such a request so far. Nevertheless, he criticized the concept of a "no number, no list" response, calling it "a kind of *Vaughn* index, albeit a radically minimalist one." He indicated that "such a response would only be justified in unusual circumstances, and only by a particularly persuasive affidavit. Nor is there any reason to regard this approach as subject to an on/off switch. . .[O]nce an agency acknowledges that it has some responsive documents, there are a variety of forms that subsequent filings in the district court may take. A pure 'no number, no list' response is at one end of that continuum; a traditional *Vaughn* index is at the other." However, noting that "we are getting ahead of ourselves," Garland sent the case back to the district court for further proceedings consistent with the D.C. Circuit's opinion. (*American Civil Liberties Union and American Civil Liberties Union Foundation v. Central Intelligence Agency*, No. 11-5320, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 15)

Court Rules Agencies Can't Refuse Duplicative Requests

` As part of her decision upholding most of the procedural claims made by the CIA in defending itself against policy and practice claims by National Security Counselors, Judge Beryl Howell has ruled that the CIA cannot refuse to respond to a subsequent request merely because it is duplicative of a previous request submitted by the same requester.

National Security Counselors had agreed to allow the CIA to combine two previous FOIA requests—one asking for the initial response letter for 15 FOIA requests from 2008 that were denied because they did not reasonably describe the records sought, the other for the response letters for 290 requests filed in 2008 the agency deemed improper for other reasons. Finding it impossible to determine which records were responsive to which request, NSC filed another request for the 15 requests considered insufficiently specific. Before Howell, the agency argued it was not required to answer questions or to provide redundant records twice to the same requester.

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Howell disagreed, noting that "the CIA is correct that the FOIA does not obligate agencies to create records or answer questions. The CIA extends this argument too far, however, when it contends that it 'is not obligated to produce redundant records to the same requester.'" Ironically, Howell had ruled the other way in *Toensing v. Dept of Justice*, 890 F. Supp. 2d 121(D.D.C. 2012), although in a substantially different context. Acknowledging her previous ruling, she explained that "in certain limited factual circumstances, this statement of law by the CIA could be accurate. For example, where a single requester fails to exhaust his administrative remedies with regard to certain withheld records, and then files a duplicative FOIA request for the exact same records in order to revive the unexhausted issued for purposes of litigation, the agency is not required to re-review the same records to indulge the requester."

Howell observed that "that, however, is not the situation here." She continued, noting that "unlike the situation presented in *Toensing*, the CIA is not refusing to produce the records sought in [the request] because it does not want to re-review the records and make new withholding determinations. Indeed, the CIA does not indicate that it would need to withhold any information from the fifteen specific records sought in [the request], which appear to consist entirely of routine correspondence from the CIA to FOIA requesters. The FOIA states categorically that, so long as a request for records 'reasonably describes such records' and complies with agency rules regarding the submission of FOIA requests, the agency 'shall make the [requested] records promptly available to any person,' subject, of course, to the exemptions contained in [the statute]. . . [A]bsent some contention that the production of redundant records to the same requester would run afoul of the FOIA by imposing an undue burden upon the CIA or requiring the CIA to create records, the Court concludes that the plaintiffs' claim. . .can go forward. The Court finds nothing in the FOIA that would foreclose an individual from seeking the production of records already disclosed to him, particularly in a situation like the instant action where an individual seeks redundant documents in order to obtain a new piece of information." She pointed out that "in such a situation, the agency is free to charge the requester for the cost of locating and copying the records in accordance with its regulations, and the agency is not necessarily required to reassess any prior withholding determinations regarding the redundant records, but the agency cannot flatly refuse to process the request on the theory that 'the FOIA does not require an agency to indulge a requester who repeatedly seeks the same records.'"

Howell also found the CIA had taken too narrow an interpretation of a request for copies of 32 documents currently published in the CIA Records Search Tool. The request also asked the agency to review the documents for full release under FOIA. The agency instead provided copies of the 32 redacted documents. Howell indicated that "the Court, however, cannot conclude that the CIA's interpretation of [the] FOIA request was reasonable as a matter of law." The CIA argued that because the request asked for copies of the attached 32 documents, "it was faced with a clear request for 'copies' of thirty-two documents' listed in the "CREST system."'" But Howell noted that "the CIA gives short shrift, however, to the remaining sentences of the opening paragraph of [the] FOIA request. In particular, the CIA selectively omits the sentence of the FOIA request, which stated that 'records which are currently published in CREST in redacted form should be reviewed for full release under FOIA.'" The agency contended the request was for copies only. Howell disagreed, pointing out that the request clarified what was meant by copies by asking that redacted records be reviewed for full release. Howell observed that "it was unreasonable for the CIA to ignore such clear instructions conveying the intended scope of a FOIA request, at least insofar as those instructions were contained within the four corners of the request itself."

Aside from these two defeats, the CIA prevailed on most of the issues before Howell. She agreed with the agency that NSC did not have standing to bring its policy and practice claims because there was no indication they were currently being affected by those policies. Howell observed that NSC's only allegation of harm was that they would continue to make requests to the CIA and would, as a result, be subjected to the challenged practices. But Howell noted that "these general statements about a 'regular' course of conduct and

an expressed intention to 'continue to do so in the future' do not establish the same concrete likelihood of injury that emanates from allegations of specific, pending FOIA requests that are likely to be subject to an agency's challenged policies."

NSC had failed to appeal three requests, but it argued that since the CIA did not provide it with a volume estimate of the disputed records the agency's denial letter was insufficient and NSC had constructively exhausted its administrative remedies. Howell found that under *Oglesby v. Dept of Army*, 920 F.2d 57 (D.C. Cir. 1990), requiring a requester to file an appeal if the agency responded before suit was filed, an agency's obligation was met once it provided a determination letter containing appeals rights. Howell noted that "the FOIA does not tie that obligation to the statute's separate provision dealing with constructive exhaustion." She added that "the Court finds no evidence from the statutory text or case law to suggest that an agency's failure to provide an estimate of the volume of material withheld permits a FOIA requester to invoke constructive exhaustion and forego an administrative appeal before filing a lawsuit."

NSC also claimed the agency had violated the Administrative Procedure Act by failing to publish its final rule on the costs incurred as a result of Mandatory Declassification Review requests for notice and comment. The agency previously used the FOIA fee categories in determining potential costs, but in its final rule the agency imposed the same costs on all requesters. Finding this was an interpretive rule not subject to notice and comment requirements, Howell pointed out that "the Final Rule in the instant action does not make it any more costly for non-commercial requesters to secure declassification of information than it does for any other members of the public, and requiring *all* MDR requesters to pay the same fees in order for the CIA to recoup the costs of searching, reviewing, and duplicating requested material can hardly be called a 'substantive value judgment' under our Circuit's precedents because the classification of requesters has no connection whatsoever to the *substance* of a request." (*National Security Counselors v. Central Intelligence Agency*, Civil Action No. 12-284 (BAH), U.S. District Court for the District of Columbia, Mar. 20)

Views from the States…

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

Kentucky

The Attorney General's Office has ruled that the non-identifying statistical information concerning the date of a physician's last surgery and mortality statistics for a certain type of procedure are not protected by HIPAA because they fall within the "required by law" exception and, because they contain no personally identifiable patient information, are disclosable under the Open Records Act. In response to a reporter's complaint that the University was denying non-personal information based on its conclusion that the information could be used to identify individual patients, the AG noted that "we have consistently held that HIPAA defers to the state Open Records Act and is therefore no obstacle to the public's access to public records under the Act. . .[E]ven if [the reporter's] request were seeking 'protected health information,' an assertion that is questionable at best, HIPAA would present no basis for denial of the records." The AG pointed out that because the format of the records was crucial to a determination of whether they were disclosable it was necessary for the AG's Office to examine the records *in camera* but the University had failed to provide the AG's Office access to the records. The AG observed that "as a rule, we find that an

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agency making such a refusal has failed to meet its burden of proof, and this case is no exception." (Order 13-ORD-046, Office of the Attorney General, Commonwealth of Kentucky, Mar. 27)

Louisiana

A court of appeals has ruled that supplemental police reports pertaining to Aaron Harvey are subject to disclosure because Harvey had died. The New Orleans Police Department told Ethan Brown that it would disclose six initial police reports on Harvey but not the supplemental reports. The trial court agreed the supplemental reports were protected. The appellate court, however, reversed. Brown argued the temporal protection for police reports ended when there was no further reasonably anticipated litigation. Since Harvey was deceased, there was no further likelihood of litigation. The police claimed the law enforcement exemption applied to subsequent reports of investigation. The appeals court noted that "[the] subsections contain temporal elements which allow for disclosure once certain factors are met. All of those temporal elements are satisfied with the death of the defendant whose records are sought." The court added that "once it is clear that no further litigation is forthcoming relative to the records requested, the exception ceases to exist and the records become subject to disclosure." (*Ethan Brown v. Ronal Serpas*, No. 2012-CA-1308, Louisiana Court of Appeal, Fourth Circuit, Mar. 20)

A court of appeals has affirmed the trial court's decision that records of the Public Integrity Bureau pertaining to investigations of individual police officers are protected by the privacy exemption and that Catherine Beckett's request for 10-years worth of PIB investigations pertaining to a specific charge is too broad because the files are only maintained by the name of the individuals investigated and not the charge. The court noted that "clearly, a law enforcement officer has a reasonable expectation of privacy as to certain personal information. . . Consequently, Beckett cannot be given unfettered review of the PIB files without the redaction of the officers' private information contained therein." As to the burdensome nature of Beckett's request, the court observed that "it is well established that the examination of records or requests for reproduction cannot be so burdensome as to interfere with the operation of the custodian's constitutional and legal duties. . .Here, given the particular facts and circumstances of this case, *i.e.*, the volume of the records requested and the manner in which the files are categorized, the City has demonstrated that segregating ten years of PIB files would be unreasonably burdensome." (*In re Public Records Request of Catherine Beckett v. Ronal Serpas*, No. 2012-CA-1349, Louisiana Court of Appeal, Fourth Circuit, Mar. 20)

New York

A trial court has ruled that the announcement of a public meeting of the Board of Trustees of the State University of New York to discuss closing the Long Island College Hospital was too vague and that the Board failed to provide enough specificity concerning its reasons for going into executive session shortly after the meaning was convened. Because the expected issues to be discussed received substantial media attention, a number of people showed up for the public meeting. However, 120 people were turned away because of inadequate space. The Board cited the statutory language of three exemptions to support closing the meeting and the executive session lasted for two hours. Finding the Board had violated the Open Meetings Law, the court noted that the notice "was so intentionally vague as to shield the public from the true purpose of the meeting of both the Committee and the Executive Session which followed and failed to meet the standard for transparency required by the Open Meetings Law. Moreover, the timing of entry into executive session almost immediately after commencing the meeting of the Committee, without any specificity as to the purpose of the Executive Session, appears also to be specifically designed to deny the public the transparency guaranteed by the Open Meetings Law." The court enjoined the university from proceeding with its plans to close the hospital until it complied with the Open Meetings Law. (*New York State Nurses Association v. State University of New York*, No. 3057/13, New York Supreme Court, Kings County, Mar. 14)

The Federal Courts…

Judge Royce Lamberth has ruled that the Center for Medicare and Medicaid Services must disclose 2009 data on the Medicare Advantage program submitted to the agency by private insurers because the agency failed to show that disclosure of the data would either impair the agency's ability to receive such data in the future or would cause the submitters substantial competitive harm under **Exemption 4 (confidential business information)**. The data was requested by Brian Biles, a professor at George Washington University School of Public Health and Health Services. The agency argued that although it would still continue to get the required data, its quality would be diminished if disclosed. But Lamberth noted that the agency failed to show "how bids could be manipulated by [insurance company participants] by using the requested data when the Bid Pricing Tool requires actuary-verified data and other strict structural requirements that cannot be modified without serious consequences." He added that in a 2010 response to similar concerns, CMS had argued that "there was no risk of loss to the integrity of the bidding process, *not* because of the *type* of data that was being released, but because the bidding process consisted of actuary-verified data. . ." Turning to the agency's competitive harm argument, Lamberth rejected the claim that disclosure would allow companies to change their strategies. He pointed out that the agency's assertion that "disclosure will enable [insurance companies] to change their practices to better compete with other [companies] is nothing more than arguing that disclosure has a likelihood of creating *competition* among [the companies]—an assertion that does not necessarily prove that disclosure has a likelihood of creating *substantial competitive harm*, which implies an 'unfair' exposure of one competitor to that competitor's detriment and to a non-exposed competitor's gain." Lamberth agreed with Biles that disclosure would put participating insurers in the same competitive position. Lamberth rejected the agency's assertion that disclosure of the 2009 data would allow Biles to identify trends in using data from later years as it was subsequently released. He noted that CMS's conclusion "does not follow, as the request for release of more recent data, as well as data over multiple years that could be trended, creates a distinguishable factual situation that requires a new analysis and new evidence of substantial competitive harm. Speculative assertions do not serve as affirmative evidence." He rejected the agency's broad competitive harm claims. He observed that "here, [the agency's] claims are again too conclusory to satisfy their burden of proof. 'Efficiency' and 'financial position' are highly generalized terms that do not, in themselves, prove competitive harm; stating that disclosure of cost information would reveal 'financial position' could describe any sort of disclosure of [insurance participants'] information, including the disclosure of payment and enrollment information that CMS has already made public." (*Brian Biles v. Department of Health and Human Services*, Civil Action No. 11-1997, U.S. District Court for the District of Columbia, Mar. 21)

Judge Beryl Howell has ruled that records relating to the SEC's oversight of the Financial Industry Regulatory Authority are categorically exempt under **Exemption 8 (bank examination records)** not only because of the broad scope of Exemption 8, but also because Congress, in repealing a provision in the Dodd-Frank Act that increased the kinds of records the SEC could withhold, replaced it by enlarging the definition of what constituted a "financial institution" under Exemption 8 for purposes of SEC oversight. The Public Investors Arbitration Bar Association requested records concerning how arbitrators were chosen for FINRA dispute resolution proceedings. The FINRA was created in 2007 with the consolidation of the enforcement arms of the New York Stock Exchange and the National Association of Securities Dealers to conduct arbitration hearings involving broker-dealer disputes. The SEC's Office of Compliance Inspectors and Examinations oversees arbitration programs at self-regulatory organizations such as the FINRA. The agency responded to PIABA by indicating that any responsive records would be protected by Exemption 8. PIABA then filed suit. Whatever the original congressional intention by adding Exemption 8, the sparse case law on the exemption has consistently concluded that the exemption is quite broad. Howell reached the same

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conclusion. She noted that "the keystone of the plaintiff's argument is that Congress did not intend, through FOIA Exemption 8, to protect from disclosure records related to a regulatory agency's examination of a financial institution's administrative functions. Indeed, only if this proposition were true would the withholding of such documents be the 'unreasonable result' of which the plaintiff repeatedly cautions. Yet, it is clear that at least one purpose of Exemption 8, apparent from both the plain meaning of its text and the legislative history, is served by withholding the records at issue in this case." She added that PIABA's limited interpretation of Exemption 8 "might make sense, from a policy perspective, to prevent self-regulatory organizations or other industry-policing organizations from becoming 'captive' to the financial institutions they regulate, rather than serving the consumer protection and market integrity functions that they were intended to perform. The text of the statute, however, indicates no such limitation." Howell observed that "the plaintiff's reading of Exemption 8 would essentially render Exemption 4 [which covers confidential financial information] superfluous, or at least would sap Exemption 4 of any meaning that is reasonably distinct from that of Exemption 8." PIABA argued that Exemption 8 only pertained to financial transactions of a financial institution, but Howell pointed out that the court in *Bloomberg. L.P. v. SEC* had concluded that notes and memoranda which were only indirectly related to financial transactions were covered by Exemption 8. She indicated that "the plaintiff does not explain why records regarding the examination of FINRA's arbitration selection process—which appear to address similar institutional concerns about fairness and transparency and that also likely have an indirect effect on the financial condition or transactions of the financial institutions appearing before FINRA—should be treated differently from the documents at issue in *Bloomberg*." Although neither party brought it up, Howell pointed out that Congress had amended the Securities Exchange Act in 2010 in an attempt to repeal a provision in the Dodd-Frank Act that granted the SEC the power to withhold investigatory records. The amendment provided that "any entity the SEC regulates under the Securities Exchange Act will be considered a financial institution for the purpose of Exemption 8." Saying that "by adding this definition of 'financial institution' that would apply in FOIA Exemption 8, Congress appears to have given back with the FOIA what it simultaneously intended to take away by repealing section 9291 [of Dodd-Frank]." Howell observed that "indeed, Congress's 2010 amendment to the Securities Exchange Act provides an *even* broader disclosure shield than section 9291 did because Exemption 8 can be invoked by any 'agency responsible for the regulation or supervision of financial institutions,' not just the SEC." She noted that "there is little question in the Court's mind that Congress's amendment effectively expanding the definition of 'financial institution' was a well-intentioned legislative fix which, as this case demonstrates, has resulted in its own set of unintended consequences." (*Public Investors Arbitration Bar Association v. United States Securities and Exchange Commission*, Civil Action No. 11-2285 (BAH), U.S. District Court for the District of Columbia, Mar. 14)

Judge Royce Lamberth has ruled that OMB properly invoked **Exemption 4 (confidential business information)** and **Exemption 5 (deliberative process privilege)** to withhold portions of records pertaining to the role of the agency's Intellectual Property Enforcement Coordinator in negotiations with representatives of the movie and music industries that resulted in voluntary adoption of a graduated response system to promote legitimate use of copyrighted information and to deter infringing activity. In response to a request by Christopher Soghoian, the agency disclosed 189 pages with redactions and withheld 16 pages entirely. Soghoian filed suit, challenging the agency's Exemption 4 and 5 claims. OMB withheld drafts of a Memorandum of Understanding between the movie and music industry and several leading internet providers, claiming they had been submitted voluntarily. Soghoian argued their submission was not voluntary but constituted a quid pro quo to encourage the government to take further steps to combat copyright infringement. Finding the information was commercial, Lamberth indicated that the agency's *Vaughn* index explanations "denote [the movie and music industries'] commercial interest in the withheld portions of the documents, as they reflect an allocation of costs surely to impact the commercial status and dealings of the trade associations' members." Lamberth next found the drafts were voluntarily submitted, noting that "unlike

other cases where awarding government contracts were necessarily based on submissions, the MoU signatories were not doing business with the government but with each other. As such, their submissions to the government were voluntary for Exemption 4 purposes." Soghoian argued the gist of the MoU had been made public in press accounts. But Lamberth pointed out that "the final MoU released publicly on July 6, 2011 is 20 pages long and contains an additional 16 pages in attachments and signature pages. In contrast, the article allegedly representing that [music industry] members leaked the MoU drafts to the press is under three pages. A review of the article shows that it provides a cursory overview of the detail described in the final MoU and in no way indicates that the author obtained any of the draft copies at issue in this case." Turning to the Exemption 5 claims, Soghoian argued that since IPEC's role was quite limited its ability to claim privilege for documents was likewise limited. Lamberth explained that it made no difference how limited IPEC's role might be as long as the claimed documents were part of the deliberative process. "Although plaintiff points out that private companies contracted to form this voluntary initiative, the Administration's role in negotiations, and the importance of the issue, will certainly result in policy decisions made by the Executive branch—even if they are decisions to wait and see how the system works before implementing regulations of the industry." While Soghoian contended that the agency was required to point to a decision to which the documents contributed, Lamberth indicated that the deliberative process privilege "protects from disclosure those documents that are integral to formulating agency policy, even if the decision regarding that policy has not yet been officially adopted." Finding that records discussing the draft MoU were protected, Lamberth noted that "protecting documents pertaining to the deliberative process here serves the underlying policy objectives of avoiding disclosure of proposed policies prior to their adoption and reducing the possibility of misleading the public by disclosing documents that suggest certain reasons for a future decision that do not ultimately bear upon that decision." (*Christopher Soghoian v. Office of Management and Budget*, Civil Action No. 11-2203 (RCL), U.S. District Court for the District of Columbia, Mar. 26)

Judge Richard Roberts has ruled that the Office of the Armed Forces Medical Examiner must disclose to journalist Roger Charles redacted versions of autopsies of troops wearing body armor who were killed in Iraq or Afghanistan because they are not protected under **Exemption 6 (invasion of privacy)**. Roberts also found that preliminary autopsy reports were protected under **Exemption 5 (deliberative process privilege)**, although the Medical Examiner had not yet shown that facts could not be **segregated** from the privileged information. Roberts first pointed out that "the defendants' evidence shows that the preliminary autopsy reports are drafts of the final autopsy reports. . .Because this assessment is entitled to deference and the agency has provided evidence to show that preliminary reports are protected by the deliberative process privilege, the agency properly invoked Exemption 5 to protect the preliminary reports." The Medical Examiner argued that factual findings in preliminary assessments could differ from those in the final autopsy, allowing a comparison that would reveal the Medical Examiner's deliberations. But Roberts observed that "the defendants do not provide evidence supporting this contention. Moreover, the defendants fail to provide a sufficiently detailed description of the information withheld, and a detailed justification correlating the claim that a comparison of the preliminary and final autopsy reports would disclose the agency's decisionmaking process with a description of the reports and the factual material they contain." Roberts rejected the Medical Examiner's claim, based on the Supreme Court's decision in *National Archives v. Favish*, 541 U.S. 157 (2004), that autopsy reports with personal information redacted would cause an invasion of privacy for family members, who were required under DOD policy to be notified when such information was disclosed. He noted that "the defendants have not demonstrated that *Favish* should be applied. . .[W]ithout demonstrating that family members *will* encounter the disclosed information, *and* be able to discern that a redacted report relates to their family member, the defendants present no more than a mere possibility of an invasion of personal privacy and that is insufficient to find that Exemption 6 applies. Although he indicated that Charles' alleged public interest in learning about the effectiveness of body armor was irrelevant, Roberts nevertheless recognized a broader

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public interest in disclosure. He observed that "the information will advance the public's right to be informed about what their government is doing with respect to body armor issued to service members." (*Roger G. Charles v. Office of the Armed Forces Medical Examiner*, Civil Action No. 09-199 (RWR), U.S. District Court for the District of Columbia, Mar. 27)

Judge Rosemary Collyer has ruled that the State Department conducted an **adequate search** for records pertaining to Emmanuel Lazaridis and his minor daughter, who is still the subject of a custody dispute and currently resides with Lazaridis in Greece, and that the majority of the agency's redactions were proper under **Exemption 6 (invasion of privacy), Exemption 7 (C) (invasion of privacy concerning law enforcement records)**, and **Exemption 5 (privileges)**. Collyer had already issued several opinions in the litigation and Lazaridis's challenges to the adequacy of the search by this time boiled down to his contention that the Office of Overseas Citizens Services had not been thoroughly searched. Collyer rejected the claim, noting that "DOS's searches were reasonably calculated to (and did) locate responsive records." Lazaridis claimed that Exemption 6 did not apply to much of the personal information concerning his ex-wife because she had already publicized the information. But Collyer pointed out that "Mr. Lazaridis's public domain argument fails because it is not predicated on an 'official and documented disclosure,' which is required to overcome the exemption, but rather on the disclosure of information by the child's mother, whom Mr. Lazaridis has not shown to have any authority to speak or act on behalf of the government. . .To the extent that Mr. Lazaridis is seeking release of exempt material on a waiver theory, the publicity surrounding the child's mother, even if she approved it, cannot be said to constitute a waiver by the agency of its right to invoke FOIA exemptions." Lazaridis claimed personal information about third parties was not protected because the agency acted in bad faith by applying the privacy exemption to such information. Collyer observed that "Mr. Lazardis's claim of impropriety based on DOS's invocation of this exemption begs the question, and he has not otherwise identified 'government misconduct' that would be revealed from the release of the third-party information contained in the authorizations." Recognizing that State was not a law enforcement agency, Collyer agreed with the agency that records pertaining to the kidnapping charges qualified as law enforcement records under Exemption 7. She rejected Lazaridis's claim that 7(C) did not apply to the personal information in the records because disclosure was in the public interest, noting that Lazaridis's "subjective assertions fail to trigger the balancing requirement not only because they are unsubstantiated but also because they present interests that are clearly personal to Mr. Lazaridis." She agreed that telephone and fax numbers could be withheld, observing that "the commonly asserted harm associated with disclosing the telephone numbers of law enforcement officers, *e.g.*, possible harassment, does not and cannot turn on whether they are work numbers or private numbers, both categories of which can lead to identifying the respective officer." Lazaridis argued that State could only claim the deliberative process privilege for internal records between DOS and its legal counsel. Rejecting that claim, Collyer pointed out that "this argument simply ignores exemption 5's language that protects records reflecting both 'intra-agency' and 'inter-agency' deliberations." However, she indicated that a memo of a telephone conversation between DOS and a Michigan detective was not covered. She explained that "since that document reflects neither inter-agency nor intra-agency discussions, the Court does not find exemption 5 applicable." (*Emmanuel N. Lazaridis v. United States Department of State*, Civil Action No. 10-1280 (RMC), U.S. District Court for the District of Columbia, Mar. 27)

A federal court in Florida has ruled that by failing to conduct an **adequate search** for records explaining why the pension benefits for Joseph and Maureen Bory were reduced the Railroad Retirement Board implicitly withheld responsive records requiring the agency to provide the Borys with appeals rights. In response to the Borys' 2009 FOIA requests, the Board provided forms containing information regarding the payment of annuities and directed them to its website for further information. Finding the response inadequate, the Borys filed an administrative appeal. The Borys subsequently filed suit, arguing the agency had failed to provide

responsive information and that they constructively exhausted administrative remedies because the agency did not inform them of their right to appeal. The agency argued that during the litigation it had disclosed further records, including some records not in existence at the time of the original requests. The Borys pointed to records in their possession that were not disclosed as a result of their requests. The court noted that "the existence of these documents calls into question Defendant's assertions that its search of three different central databases using Plaintiffs' social security number and the production of documents it located as a result was adequate to uncover all relevant documents. . .such that it was not required to notify them of their right to appeal under the FOIA." Aside from the records the Borys already had, the agency released a number of other records as the litigation progressed. Faced with these other records, the court noted that "the existence of so many additional documents cannot support a finding that Defendant's initial search was reasonably calculated to uncover all responsive documents relevant to the reduction of Plaintiffs' benefits in 2008." The court observed that "on the basis of the record before it, the Court finds that Plaintiffs have established that Defendant improperly withheld records subject to FOIA release because the search they conducted was not reasonably calculated to discover all responsive documents." The court added that "there is no indication in the record that the employees responsible for responding to Plaintiffs' FOIA requests ever consulted with other employees handling Plaintiffs benefit claims to attempt to determine if they possessed any other records relevant to the calculation of the Plaintiffs' benefits." The court concluded that because the agency's search was incomplete, it was required to provide the Borys with notice of their right to appeal. (*Joseph and Maureen Bory v. U.S. Railroad Retirement Board*, Civil Action No. 3:09-cv-1149-J-12MCR, U.S. District Court for the Middle District of Florida, Jacksonville Division, Mar. 20)

A federal court in Kentucky has ruled that the Bureau of Prisons' two-year delay in responding to prisoner Clifton Davidson's request for an audit by the American Correctional Association of the federal facility in which he was housed did not amount to bad faith on the part of the agency and that, as a result, Davidson is not entitled to recoup the majority of his court costs. BOP responded to Davidson's original request in June 2010 and asked him to pay a $33.70 copying charge. He had the amount deducted from his account but never received the documents. After Davidson filed suit in April 2012, the court ordered BOP to explain why it had not provided the documents. BOP admitted to several administrative oversights, but argued that it had compiled 372 pages for Davidson and was waiting for him to pay fees. The court agreed that it did not have jurisdiction because with the agency's willingness to provide the records the case was now moot. Davidson argued that he still had not received the records, but the court noted that "BOP had compiled the responsive documents by August 1, 2012, and was awaiting only Davidson's proper payment of the copying charge. This minor housekeeping matter does not present a legally viable basis upon which to distinguish a uniform body of federal law [finding a FOIA action is moot when the agency responds]." Davidson argued disclosure was in the public interest because it informed inmates of a facility's conditions. But the court pointed out that "while some public interest might result from providing Davidson with the documents he requests from the BOP relative to the ACA audit, or the citizenry might be generally assisted in making an informed judgment about governmental operations, the key word is 'might,' not 'is' or 'will.' The Court is left to speculate about the nature and extent of the benefit to the public. . ." Rejecting Davidson's claim of bad faith on the part of the agency, the court observed that "the BOP's delay in responding to Davidson's FOIA request was quite lengthy, but it resulted from an employee leaving the BOP, and lack of supervisory and administrative oversight, not bad faith. The delay did not stem from the BOP's 'recalcitrance' in opposing Davidson's FOIA request." Nevertheless, the court decided to refund Davidson his $350 filing fee. (*Clifton B. Davidson v. Bureau of Prisons*, Civil Action No. 11-309-KSF, U.S. District Court for the Eastern District of Kentucky, Central Division, Mar. 19)

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Judge Royce Lamberth has rejected a request by the U.S. International Boundary and Water Commission to amend his previous ruling chastising the agency for its poor search in response to a request by Public Employees for Environmental Responsibility. Lamberth had accused IBWC of "blowing off" PEER's request and the agency attempted to show Lamberth that it had taken PEER's request seriously. But Lamberth found the agency had provided no more information that it could have done at the time of the original summary judgment motions. He noted that "IBWC had an obligation to present evidence showing that it complied with its FOIA obligations as part of its motion for summary judgment or in response to PEER's motion for summary judgment, but it evidently failed to do so. Therefore, it is clear that IBWC's motion is simply an attempt—a poor one at that—to relitigate issues disposed of by the Court's [earlier order], and as such it cannot succeed." He added that "the fact that IBWC is a 'very small' agency does not convert its limited search into a reasonable one. The Court is unaware of any section of the FOIA statute, or any case law, that allows the Court to treat agencies differently based on their size. The law is the law and it applies equally to all—whether the target of a FOIA request is the Department of Defense or the IBWC." (*Public Employees for Environmental Responsibility v. U.S. International Boundary and Water Commission*, Civil Action No. 10-19 (RCL), U.S. District Court for the District of Columbia, Mar. 19)

Judge Richard Roberts has dismissed Freedom Watch's FACA suit concerning its allegations that individuals and groups that provided perspective on the healthcare bill constituted a de facto advisory committee. In response to an earlier court order, the White House affidavits provided more information. Roberts noted that "the government's evidence provided the names of the individuals who attended the White House Forum on Health Reform as well as a list of the individuals who attended meetings with the Office of Health Reform from March 2009 to March 2010. These documents also reflect both the number of meetings and the individuals and entities who attended the meetings. [The government's affidavit indicates that] the participants were only to provide 'individual views' and 'were not asked to, and did not, provide advice or recommendations as a group.'" Roberts added that "the defendants' submissions reflect that the individuals attending these meetings varied significantly and there is no evidence that the defendants had the goal of extracting collective advice or collaborative work product from the stakeholder meetings. The defendants have provided sufficient evidence to support their claim that the alleged committee does not fall within the scope of FACA." Roberts rejected Freedom Watch's request for discovery. He noted that "Freedom Watch has not specified what facts it intends to discover to rebut the government's evidence. Instead, Freedom Watch simply states that the defendants' 'are in sole custody' of the relevant information. The plaintiff's request for discovery is unsupported by any facts and includes only the type of conclusory allegations which are insufficient for gaining relief under [the rules of discovery]." (*Freedom Watch, Inc. v. Barack Obama*, Civil Action No. 09-2398 (RWR), U.S. District Court for the District of Columbia, Mar. 15)

Information Items...

Sunshine Week Round-Up

A number of public interest groups analyzed statistics and trends pertaining to FOIA and open government in celebration of Sunshine Week, Mar. 11-15. Those included:

National Security Archive

The National Security Archive updated its December 2012 audit on the number of agencies that had failed to update their FOIA regulations since the passage of the OPEN Government Act in 2007. The audit found that 53 of 100 agencies had not updated their regulations to incorporate changes made by the OPEN

Government Act. The audit also found that 59 agencies had made no changes reflecting the 2009 Holder FOIA memo requiring agencies to exercise a presumption of openness. While the number of requests in 2012 rose by 5.3 percent, the number of times agencies cited Exemption 5 rose by 17.9 percent.

The Security Archive bestowed its Rosemary Award for worst open government performance of any agency on the Department of Justice for the second year in a row. The Security Archive noted that during Senate testimony on Mar. 13, Office of Information Policy Director Melanie Pustay told members of the Senate Judiciary Committee that updating agency regulations in response to the 2007 OPEN Government Act and the 2009 Attorney General's FOIA memo was optional and "not required." Pustay added that DOJ was almost finished with updating its regulations. Sen. Patrick Leahy (D-VT) remarked to Pustay that it took him less time to finish law school than it took DOJ to finally update its regulations five years after OPEN Government Act was passed. Another reason for choosing DOJ again this year, according to the Security Archive, was the fact that it continues to claim a release rate of over 90 percent. The Security Archive noted this number fails to take into account requests denied as "no records," "referrals," fee-related problems," or "not reasonably described," which when added brings the release rate down to 55-60 percent. However, the Security Archive gave DOJ credit for prodding agencies to close their 10 oldest FOIA requests.

Transactional Records Access Clearinghouse

Based on its analysis of FOIA litigation filed by media, TRAC found media lawsuits had dropped from 22 in the last four years of the Bush administration to 18 in the first four years of the Obama administration, a drop of .4 percent. TRAC found that the New York Times was by far the most prolific litigator with 12 suits under Bush and Obama, trailed by Fox News at five, the Associated Press with four, and Bloomberg News with two. TRAC also analyzed 40,000 requests submitted to Immigration and Customs Enforcement between October 2010 and August 2012, finding a total of 233 media requests.

Center for Effective Government

The Center for Effective Government, formerly OMB Watch, looked at FOIA statistics in annual reports and found that while requests peaked in the last years of the Clinton administration and fell off during the Bush administration, they began to rise during the Obama administration. The Center found an increase of more than 11,000 requests in 2012 compared to 2011. Agencies processed more than 512,000 requests in 2012, an increase of 39,000 requests over 2011. There was a decrease in pending requests from 2011 of nearly 12,000. The bulk of the decrease was attributable to the Department of Homeland Security, which also saw a 30 percent decrease in its backlog. The Center found that partial releases occurred in nearly 54 percent of completed requests, meaning that only 41 percent of processed requests were granted in full. The number of times exemptions were claimed rose in 2012. The most commonly cited exemptions were the two privacy exemptions—6 and 7(C)—and the law enforcement techniques exemption, 7(E), which has emerged as the fallback for the departed circumvention prong of Exemption 2. In fact, the Center found the use of Exemption 2 went down by 92 percent. The Center found that the NRC had a $8,900 cost per request and the Energy Department reported a cost of $3,800. Homeland Security was able to keep its per request costs under $200.

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