Volume 39, Number 8
April 10, 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: Sen. David Vitter (R-LA) and other Republican Senators on the Environment and Public Works Committee have sent a letter to the EPA criticizing it for its FOIA release of information concerning concentrated animal feed operations, which apparently included personal contact information and email addresses. The letter noted that "this action demonstrates a troubling disregard for the interests of both private citizens and competitive businesses." Criticizing the disclosure, the letter further observed that "FOIA is not, however, a mechanism by which private citizens or organizations may obtain personal information of other private citizens, or confidential business information. EPA's current application of FOIA thus represents the antithesis of a transparent government and an offensive abuse of agency discretion."

Acknowledgement Letter Does Not Constitute Determination of Request

Although FOIA is nearly 47 years old, it is not until now that the question of what constitutes a "determination" in response to a FOIA request has finally received a definitive answer. In a closely-watched case brought by CREW against the Federal Election Commission, the D.C. Circuit has ruled that, at a minimum, a determination requires an agency to inform the requester of the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.

On March 7, 2011, CREW requested correspondence, calendars, agendas, and schedules for the FEC commissioners. The agency acknowledged receipt of the request the next day. Over the course of several weeks, CREW agreed to exclude certain categories of records and the agency agreed to provide non-exempt records on a rolling basis. Having heard nothing further by May 23, CREW filed suit alleging that since the agency had missed the statutory 20-day time limit for responding it had constructively exhausted its administrative remedies.

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In June, the FEC released 835 pages and told CREW that it was continuing to process its request and that upon completion the agency would provide a decision letter explaining CREW's right to appeal. The agency's June 15 letter noted that "today's letter does not constitute a final agency decision, and thus is not subject to appeal." Its final letter on June 23 explained that certain records were being withheld and advised CREW of its right to appeal. Also on June 23, the agency filed a motion in opposition to CREW's complaint, asking the court to find that the case was now moot because the agency had provided responsive records or, alternatively, to find that CREW had failed to exhaust its administrative remedies before bringing suit. District Court Judge Colleen Kollar-Kotelly ruled that the case was not moot, but that the agency's initial exchanges with CREW constituted a determination under the statute.

Quickly finding the case was not moot because CREW was still challenging the agency's failure to disclose all responsive records, Circuit Court Judge Brett Kavanaugh moved to the issue of what constituted a determination. He noted that the statute required an agency to make a determination on a request within 20 working days, which could be extended to 30 working days if "unusual circumstances" existed. Failure to respond within the statutory time limits allows the requester to consider that his or her administrative remedies are constructively exhausted and immediately file suit. But, Kavanaugh observed, an agency can still argue in court that "exceptional circumstances" exist and the court may allow the agency additional time to process the request.

Regardless, Kavanaugh explained that the critical question was what constituted a determination. Answering the question, Kavanaugh pointed out that "the statute requires that, within the relevant time period, an agency must determine whether to comply with a request—that is, whether the requester will receive all the documents the requester seeks. It is not enough that, within the relevant time period, the agency simply decide to decide later. Therefore, within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions."

Kavanaugh proceeded to explain how the court reached that conclusion. He pointed out that the statute requires an agency making a determination to immediately "notify the person making such request of such determination *and the reasons therefor*." He indicated that "the statutory requirement that the agency provide 'the reasons' for its 'determination' strongly suggests that the reasons are particularized to the 'determination' —most obviously, the specific exemptions that may apply to certain withheld records. The statutory requirement would not make a lot of sense if, as the FEC argues, the agency was merely required to state within 20 working days its future intent to eventually produce documents and claim exemptions."

The statute also requires an agency to provide appeal rights at the time it makes a determination. Kavanaugh noted that "the requirement that the agency notify the requesters about administrative appeal rights further indicates that the 'determination' must be substantive, not just a statement of a future intent to produce non-exempt responsive documents." Kavanaugh observed that the appeals argument "unravels the maneuver that the FEC (backed by the Department of Justice) is attempting here. Under the FEC's theory, an agency could respond to a request within 20 working days in terms not susceptible to immediate administrative appeal—by simply stating, in essence, that it will produce documents and claim exemptions over withheld documents in the future. Then, the agency could process the request at its leisure, free from any timelines. All the while, the agency's actions would remain immune from suit because the requester would not yet have been able to appeal and exhaust administrative appeal remedies. Therein lies the Catch-22 that the agency seeks to jam into FOIA: A requester cannot appeal within the agency because the agency has not provided the necessary information. Yet the requester cannot go to court because the requester has not appealed within the agency. Although the agency may desire to keep FOIA requests bottled up in limbo for months or years on end, the statute simply does not countenance such a system, as we read the statutory text." Applying this to

the case at hand, Kavanaugh explained that "by arguing that it made a 'determination' in March and simultaneously saying nothing could be administratively appealed until June, the FEC's position on CREW's request amply demonstrates the impermissible Catch-22 it seeks to enshrine in the law."

Kavanaugh pointed out that the agency's position undercut the "unusual circumstances" provision as well. He observed that "there would be no need for the unusual circumstances safety valve, if, as the FEC argues, the usual 20-working-day timeline merely required an agency to make a general promise to produce non-exempt documents and claim exemptions in the future. . .Thus, the FEC's reading of FOIA would render the usual circumstances safety valve a worthless addendum to the statute." Likewise, Kavanaugh noted, the FEC's claim would also undermine the exceptional circumstances provision. "The agency would not need more time merely to state a preliminary intention to produce whatever non-exempt records are eventually found. Again, the FEC's theory of the statute would negate any need for the exceptional circumstances provision."

Kavanaugh took pains to point out: "to be clear, a 'determination' does not require actual *production* of the records to the requester at the exact same time that the 'determination' is communicated to the requester." He added that "the agency may still need some additional time to physically redact, duplicate, or assemble for production the documents that it has already gathered and decided to produce. The agency must do so and then produce the records 'promptly.' Our reading of 'determination' thus neatly complements the requirement that documents be made 'promptly available.'"

Kavanaugh explained that if agencies wanted a different statutory scheme they needed to persuade Congress. "It is true that the statute does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight. But Congress made that decision. If the Executive Branch does not like it or disagrees with Congress's judgment, it may so inform Congress and seek new legislation." (*Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, No. 12-5004, U.S. Court of Appeals for the District of Columbia Circuit, Apr. 2)

Editor's Note: The Justice Department really has blood on its hands in this case and should have moved to stop the litigation before it began. Instead, it ended up supporting the FEC's position even though it had admitted the two cases upon which the FEC primarily relied—*Love v. FBI*, 660 F. Supp. 2d 56 (D.D.C. 2009) and *Petit-Frere v. U.S. Attorney's Office for the Southern District of Florida*, 664 F. Supp. 2d 69 (D.D.C. 2009) were incorrect in concluding with virtually no analysis that an acknowledgment letter constituted a determination under FOIA. Until that time, no one in the FOIA litigation community believed an acknowledgement letter satisfied the determination requirement, including the Justice Department. It is almost certain that if the *Petit-Frere* and *Love* had not appeared, the FEC would never have taken the position it did. The FEC cited *Petit-Frere* as supporting is decision. Although in answer to CREW's query as to whether it considered *Petit-Frere* correctly decided, DOJ indicated that it was not correct, the Department still ended up supporting the FEC's position. While the fact that District Court Judge Colleen Kollar-Kotelly agreed with the government at the district court level might provide some indication that the argument was not too far-fetched, DOJ's responsibility to encourage agency compliance with FOIA should have weighed heavily against allowing such a litigation theory to continue.

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Views from the States…

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

Hawaii

The Office of Information Practices has ruled that the Department of Transportation must disclose personal information about various requesters for records concerning a workplace violence complaint, but that other personal information of third parties contained in the records are protected by the privacy exemption. Nevertheless, OIP found that information about disciplinary action taken against an employee is not protected because the public interest in disclosure outweighs the individual's personal privacy interests. Noting that the requesters had a right of access to personal information about themselves, OIP indicated that "each Requester [is allowed] to have access to information in the Report that is, in fact, about her, even if the same information is also about another individual, unless an exemption applies." OIP added that "nearly all of the Report is [the complainant's] personal record since she is identified throughout the Report as the purported victim of the alleged workplace violence incident, which is the subject matter of the Report." OIP pointed out that information provided by third parties was protected, but that information about disciplinary action taken against the accused employee was not. "Because the Respondent's privacy interest in the information regarding her suspension is not significant, and because there is at least a scintilla of public interest in disclosure, OIP finds that, on balance, this privacy interest is necessarily outweighed by the public interest in disclosure." (OIP Opinion Letter No. F13-01, Office of Information Practices, Office of the Lieutenant Governor, State of Hawaii, Apr. 5)

Illinois

A court of appeals has ruled that the Electoral Board of Thornton Township High School District 205 violated the Open Meetings Act when it adopted a decision removing three candidates' names from the ballot because their nomination papers were not securely bound when submitted. At a public meeting, the three person Electoral Board agreed that the evidence supported Bernadette Lawrence's complaint concerning the unsecured nomination pages. Two members signed the written decision. The Electoral Board reconvened several days later with only one board member present, who added her signature to the written decision and recessed the meeting. The candidates who had been removed from the ballot filed suit and the trial court found the Electoral Board's actions were invalid because the decision had not been adopted at an open meeting. The appeals court agreed, noting that "when the electoral board met [the second time], a quorum of members was not present to issue its written decisions, as the parties agree only one board member was present. Hence, the procedure used by the electoral board for signing the written decisions violated the provisions of the Open Meetings Act, as did the issuance of those decisions. . .Issuing the signed written decisions was the 'final action' by the electoral board and had to occur in an open meeting with a quorum present. The vote [at the first meeting] coupled with the two signatures on the written decisions obtained before the board's attempt to reconvene a quorum does not suffice." The court concluded that "due to these violations of the Open Meetings Act and the Election Code, no final decision on Lawrence's objections to the candidates' papers was issued by the electoral board." (*Bernadette Lawrence v. Kenneth Williams, et al.*, No. 1-13-0757, Illinois Appellate Court, First District, Third Division, Apr. 9)

New York

A court of appeals has ruled that the Legal Aid Society is entitled to attorney's fees for its suit against the Department of Corrections and Community Supervision even though it resulted in no records. The Legal Aid Society asked for records concerning compliance with the Americans with Disabilities Act. The Department eventually provided records that were non-responsive and the Legal Aid Society continued to pursue its administrative remedies, asking the Department to either provide records or certify that it had no records. The Legal Aid Society finally filed suit, asking for attorney's fees and costs. The Department explained that after a diligent search it had found no records. The trial court dismissed the Legal Aid Society's suit as moot. However, on the question of attorney's fees, the appeals court reversed. Indicating that the Legal Aid Society had substantially prevailed by forcing the Department to process its request, the appeals court noted that "the fact that full compliance with the statute was finally achieved in the form of a certification that the requested record could not be found after a diligent search, as opposed to the production of responsive records, does not preclude a petitioner from being found to have substantially prevailed, for the petitioner received the full and only response available pursuant to the statute under the circumstances." The appeals court observed that "petitioner, who doggedly pursued its request for more than a year and never received a responsive reply to that request or its appeals prior to the commencement of this proceeding, has been subjected to the very kinds of 'unreasonable delays and denials of access, which the counsel fee provision seeks to deter." (*In the Matter of Legal Aid Society v. New York State Department of Corrections and Community Supervision*, No. 515257, New York Supreme Court, Appellate Division, Third Judicial Department, Apr. 4)

Washington

A court of appeals has upheld a trial court's award of $45 per diem and $132,585 in attorney's fees to Turner Helton for his suit against the Seattle Police Department for records concerning his complaint that police used unnecessary force when taking him into custody. The police concluded that Helton's complaint was unfounded. He then requested the records and received a two-page summary and a list of 16 records withheld entirely. He filed suit and after the Washington Supreme Court ruled in a separate case that reports of unsubstantiated investigations of police misconduct must be disclosed, the police released the records. Considering the supreme court's multi-part guidance on penalties and awards in *Yousoufian v. Office of Ron Sims*, 229 P. 3d 735 (2010), the trial court settled on the $45 per diem award, and, after requesting Helton to provide further justification for his attorney's fees request, concluded that $132,585 was appropriate. The Seattle police appealed. Observing that trial courts had broad discretion in such matters, the appeals court upheld the award. The appeals court noted that "the [trial] court also determined that SPD gave 'too short a shrift' to Helton's request and read the [Public Records Act] too narrowly by refusing to disclose records that were clearly not exempt from disclosure such as Helton's own statement to SPD and the medical incident report. SPD does not dispute that these records were not exempt. SPD's good faith reliance on a PRA exemption does not exonerate it from the imposition of a penalty where it erroneously withheld a public record." (*Turner Helton v. Seattle Police Department*, No. 68016-1-I, and No. 68910-0-I, Washington Court of Appeals, Division I, Apr. 8)

The Federal Courts…

Judge Emmet Sullivan has ruled that while some information concerning country-by-country surveys of Peace Corps volunteers is protected by **Exemption 6 (invasion of privacy)**, the public interest in disclosure outweighs the minimal privacy interests. Sullivan also found the agency's invocation of **Exemption 5**

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(deliberative process privilege) too broad because it protected information merely because it could be useful in agency policy deliberations. The case involved a request by former Peace Corps volunteer Charles Ludlam, an advocate for strengthening and revitalizing the Peace Corps. He requested a comprehensive survey of volunteers for 2009 and 2010, including country-by-country and program-by-program breakouts. The surveys consisted of questions requiring multiple choice answers. The agency withheld information from the surveys under both Exemption 5 and Exemption 6. Ludlam initially claimed that, since the agency's entire 2008 survey was public, the agency had waived its right to withhold similar information in 2009 and 2010 surveys. Sullivan rejected that claim, noting that "considering that the responses to the later surveys were provided by a different group of volunteers, regarding their experiences during a different time period, the responses will not be identical to those provided in 2008." Sullivan added that "while agency leaders may have disseminated the survey results within the agency, the plaintiff has not shown that Peace Corps officials were authorized to, or did, release 2009 or 2010 survey results to the general public outside the agency." The agency had withheld responses to questions pertaining to rating staff performance, insensitive or discriminatory conduct by individuals in the host country, and whether the volunteers had been victims of crime in the host country. Sullivan found the agency had met its burden for withholding personal information only as to rating staff performance. He noted that "the agency has explained that it withheld responses that rate specific staff positions, and at the country or project level, these positions are 'typically filled by one person or a few at most.'. . .[T]here is more than a 'mere possibility' that employment ratings data could be linked to a particular individual if this information were released." But noting that there were 7671 volunteers in 2009 and 8655 in 2010, Sullivan rejected the agency's claim that individuals could be identified by disclosure of ratings on how volunteers were treated in their host countries. He pointed out that mere assertions that individuals could be identified "unsupported by any information such as the number of Volunteers in any country or program, the typical size of the host families with whom Volunteers stay, or the size of the communities or workplaces in which volunteers are placed, is simply not enough for the agency to meet its burden to demonstrate that the exemption applies." Sullivan then found the public interest in the agency's ability to protect its volunteers, particularly in light of the 2011 passage of the Kate Puzey Peace Corps Volunteer Protection Act, weighed in favor of disclosing the performance ratings as well. Sullivan explained that "there is a strong public interest in monitoring the Peace Corps' protection of Volunteers' safety and security, which must necessarily include effective management within each country." Sullivan rejected the agency's Exemption 5 claims as too broad. He indicated that "to permit Defendant to assert the deliberative process privilege for every piece of information which could be used, in some way or another, in the continuous process of improving the Agency would set virtually no limit on the privilege. Exemption 5's protections do not reach nearly this far." (*Charles Ludlam v. United States Peace Corps*, Civil Action No. 11-1570 (EGS), U.S. District Court for the District of Columbia, Mar. 29)

Judge Colleen Kollar-Kotelly has ruled that the FBI failed to show the existence of **exceptional circumstances** that would qualify it for a stay until October 2014 in order to finish processing a request from EPIC on its "StingRay" cell-site simulator technology designed to allow it to track and locate cellular phones and other wireless devices. The agency estimated EPIC's request could encompass 25,000 pages and that about 5,000 pages would require classification review. Kollar-Kotelly noted that "the bottom line is that the FBI failed to show that it is 'deluged with [a] volume of requests. . .vastly in excess of that anticipated by Congress.' The number of FOIA/Privacy Act requests received by the FBI increased from 17, 755 in FY 2011 to 19,599 through the first eleven months of FY 2012. . .[B]ut the publicly available data reported by the Department of Justice indicates that the number of FOIA requests received by the FBI dropped by over 25% between FY 2008 (17,241 requests) and FY 2012 (12,783 requests). . .[T[he data strongly suggests that the number of requests received by the FBI in the past two fiscal years is not 'vastly in excess' of the volume anticipated by Congress, and, if anything, has dropped substantially over the past several fiscal years." The FBI argued that the complexity of its requests had increased, but admitted that the increase was due to a

change in Justice Department policy. Kollar-Kotelly observed that "beyond emphasizing the increased average of size of incoming requests, the FBI fails to articulate why the agency's own policy change should support a finding of exceptional circumstances, as opposed to being considered part of the 'predictable workload' the statute specifically states does not justify a stay." Kollar-Kotelly also rejected the agency's claim that its FOIA litigation workload had increased. Instead, she indicated that "without more elaboration as to the FBI's litigation-related processing obligations over specific periods of time, the Court cannot determine what, if any, impact these obligations should have on the Court's analysis of the FBI's FOIA workload. If anything, the fact that the FBI indicated on August 1, 2012, that it anticipated being able to process approximately 5,000 pages per month in another case demonstrates that the FBI is not facing such exceptional circumstances that it can only review 1,500 pages per month in response to EPIC's request." Kollar-Kotelly also dismissed the agency's claim that it was making reasonable progress in reducing its backlog. Instead, she noted that "using the publicly available data, the number of FOIA requests received by the FBI increased by 15% in FY 2012, but the backlog of requests increased by 65%. For broader context, consider that the FBI backlog of FOIA requests increased by 55% between FY 2008 (1476 pending requests) and FY 2012 (2296 pending requests), despite a 27% *decrease* in new FOIA requests. The FBI's efforts to increase the efficiency of its system for processing FOIA requests are certainly commendable, but on this record the Court cannot find that these efforts have led to 'reasonable progress' in reducing the agency's backlog." (*Electronic Privacy Information Center v. Federal Bureau of Investigation*, Civil Action No. 12-667 (CKK), U.S. District Court for the District of Columbia, Mar. 28)

The Eleventh Circuit has affirmed a district court's ruling that an existing Florida statute requiring nursing homes to disclose medical records of deceased nursing home residents to spouses and attorneys-in-fact who do not qualify under the federal HIPAA's definition of "personal representatives" violates the privacy protections of HIPAA. In response to requests for medical records from spouses and other representatives, OPIS Management Resources and other nursing home operators refused to disclose the records. The requesting parties filed a complaint with the Office of Civil Rights at the Department of Health and Human Services, which agreed with the nursing homes. However, the Florida Agency for Health Care Administration issued administrative citations to the nursing home operators for violating the state law requiring disclosure. As a result, the nursing home operators filed suit in federal district court for a declaratory judgment. The district court again agreed with the nursing home operators and the State appealed to the Eleventh Circuit. The State argued the disclosures were permitted under the provision in HIPAA's privacy rule allowing any person with the authority to act on behalf of a deceased individual under state law to be treated as a personal representative. But the Eleventh Circuit noted that "the fatal flaw in the State Agency's argument is that the plain language of [the state statute] does not empower or require an individual to act on behalf of a deceased resident. The unadorned text of the state statute authorizes sweeping disclosures, making a deceased resident's protected information available to a spouse or other enumerated party upon request, without any need for authorization, for any conceivable reason, and without regard to the authority of the individual making the request to act in a deceased resident's stead. We therefore agree with the district court that [the state statute] frustrates the federal objective of limiting disclosures of protected health information, and that the statute is thus preempted by the more stringent privacy protections of HIPAA and the Privacy Rule." After dismissing the State Agency's claim, the appeals court observed that "we have no occasion to address the State Agency's argument that it is possible to comply with both HIPAA and [the state statute] because [HIPAA's privacy rule] permits a covered entity to use and disclosed protected health information as 'required by law.' The State Agency did not advance this argument before the district court, and we decline to consider it for the first time on appeal. Thus, nothing that we have said should be inferred as expressing an opinion regarding the 'required by law' provision." (*OPIS Management Resources LLC, et al. v. Secretary, Florida Agency for Health Care Administration*, No. 12-12593, U.S. Court of Appeals for the Eleventh Circuit, Apr. 9)

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The D.C. Circuit has ruled that the district court erred in not allowing a negative inference from the Justice Department's destruction of records used in deciding not to interview some candidates for the Department's Honors Program based on their affiliation with liberal organizations or causes because the Department should have known such records would be subject to litigation. Although the Department's own investigation found the use of ideological considerations was rampant, because the annotated records were destroyed in 2007, the district court concluded that Sean Gerlich and others could not show that the records were used to improperly exclude them from interviews. Since the plaintiffs had failed to argue that the records constituted a functional system of records for **Privacy Act** purposes at the district court, the D.C. Circuit found that the plaintiffs could continue only with their challenges under subsection (e)(5) pertaining to the maintenance of records, and subsection (e)(7) pertaining to maintenance of records on First Amendment activities because the finding of a violation of these two subsections did not depend on whether the records were in a system of records. As to the negative inference related to the destruction of the records, the D.C. Circuit noted that "the officials involved in the 2006 Honors Program applicant screening were lawyers working for a department regularly involved in litigation who could hardly not have known, given the egregious and notorious factual circumstances, that the working copies of the applications, with their annotations highlighting reasons for 'deselection' [for interviews] and the accompanying internet printouts attached to support a particular 'deselection' decision, would be relevant to the Department's investigation and likely future litigation." The court indicated that "a reasonable trier of fact could find that the record destruction was neither accidental nor simply a matter of utilizing the Department's record destruction schedule." (*Sean Gerlich, et al. v. United States Department of Justice*, No. 09-5354, U.S. Court of Appeals for the District of Columbia Circuit, Mar. 29)