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Washington Focus: Republican members of the House Agriculture Committee are still fuming about the inadvertent release of contact information on Contained Animal Feeding Operations operators released by the EPA to environmental groups. Rep. Bob Gibbs (R-OH) expressed his anger in a blog posting for The Hill. Calling the release "incompetent or deliberate," Gibbs contended disclosure of contact information for these operations could place the owners "at risk of possible vigilantes." He indicated that "I along with sixteen of my colleagues have demanded a copy of the agency's entire investigation, as well as their plan of action to protect these farmers whose privacy has been breached." Noting Gibbs' ire in a posting on The FOIA Blog, Scott Hodes observed that "if Gibbs is truly concerned about the adequacy of FOIA employees he should take steps to make sure FOIA Operations are fully staffed and funded so that FOIA employees are given the proper oversight and training needed to do their jobs successfully."

Court Rules Names of Attendees At Army Training School Not Private

A federal court in California has ruled that the Defense Department has failed to show that either Exemption 3 (other statutes) or Exemption 6 (invasion of privacy) protects the names of students and instructors at the Western Hemisphere Institute for Security Cooperation, formerly know at the U.S. Army School of the Americas, which provides combat and counterinsurgency training to military leaders primarily from Latin American countries. In a strong rebuke to the government's position, Judge Phyllis Hamilton found that the privacy interests were minimal and clearly outweighed by the public interest in disclosure. She also held that § 1083 of the National Defense Authorization Act of 2010, requiring the agency to disclose the information unless the Secretary of Defense concluded that disclosure was not in the "national interest," did not even qualify as an Exemption 3 statute.

The records were requested by two members of the School of the Americas Watch, founded in 1990 after SOA graduates were linked to the killing of six Jesuit priests in El Salvador.

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Starting in 1994, DOD had provided names of SOA students and instructors to SOA Watch dating back to 1946. SOA Watch used the data to create a database that could link SOA attendees with reported atrocities. DOD continued to provide SOA Watch with the data until 2004, when it stopped making the data public. In March 2011, Theresa Cameranesi and Judith Liteky requested the data on students and instructors from 2005-2010. DOD denied the request on the basis of Exemption 6. Cameranesi and Liteky appealed and the agency affirmed the original denial and added § 1083 as a further basis for denying the information. SOA Watch then filed suit.

Hamilton first turned to the Exemption 3 claim, noting that "an Exemption 3 statute's 'identified class of nondisclosable matters' must be narrow to meet the requirements of Exemption 3." While DOD contended that § 1083 qualified as an Exemption 3 statute, SOA Watch argued the discretion to withhold in the "national interest" was far too broad. Hamilton agreed with SOA Watch. She first pointed out that § 1083 by its terms only applied to FY 2009 and 2010. She then noted that "the court is not persuaded that § 1083 qualifies as an Exemption 3 statute, primarily because it does not provide any specific criteria for withholding information. Section 1083 purports to give the Secretary of Defense unbounded discretion to disclose or withhold the names of WHINSEC attendees for FY 2009 and 2010 in the 'national interest,' but provides no guidance whatsoever for the exercise of that discretion."

The Defense Department argued that a similar statute allowing for non-disclosure if the head of the agency decided it was in the national interest had been upheld in *Lessner v. Dept of Commerce*, 827 F.2d 1333 (9th Cir. 1987). Hamilton pointed out that the statute in *Lessner* provided for non-disclosure of information unless the head of the agency concluded disclosure was in the national interest while § 1083 required disclosure unless the Secretary of Defense concluded non-disclosure was in the national interest. She observed that "apart from the fact that both statutes allow the agency head to make a determination based on 'national interest,' the language and intent of the two statutes are remarkably un-similar." She observed that "in short, in *Lessner*, the statute plainly indicated a presumption that the information will not be disclosed, whereas here, the statute clearly provides that the information is to be disclosed *unless* the agency determines some national interest requires that it not be disclosed. Thus, the fact that the court in *Lessner* found that the court's ruling that 'in the national interest' was a sufficient 'criteria' to disclosure information is not persuasive in this case—particularly given that up until 2005, DOD routinely released this information in response to FOIA requests."

Hamilton then found that Exemption 6 did not protect the information either. She pointed out that "defendants have not established that the WHINSEC students and instructors have a substantial privacy interest in their names and military units—particularly the international students and instructors." She indicated that "at most, defendants have made a showing that some international students or instructors might consider their names and military units to be private information, and might object to disclosure of that information. . .DOD's position appears to be that the court should simply defer to the Secretary's determination that the information should be withheld. This position is clearly at odds with the entire premise of FOIA, which mandates a strong policy in favor of disclosure."

Much of DOD's privacy argument relied on a 2002 memorandum regarding disclosures of information about members of the military. Hamilton pointed out that the memo "does not, on its face, apply to foreign individuals attending or working at WHINSEC, or to civilian contractors. Moreover, the memorandum does not establish a 'policy' of nondisclosure, but rather merely states a policy that after the events of September 11, 2001, nondisclosure will be given more serious weight in the analysis." She further explained that DOD's claim that "the Army's General Counsel 'recognized' in 2005 that international personnel should have the same privacy rights as U.S. personnel" carried no legal weight because "there is no evidence that this reflects official DOD policy. . ."

Hamilton pointed out that DOD's argument focused more on security than privacy. She noted that "defendants argue 'safety' only in a generalized sense—not 'invasion of privacy' or 'embarrassment' that would result from the disclosure of the names and military units. Defendants have made no showing that the military status of the attendees is a secret in their home countries. In addition, the assertion that withholding is proper based on a 'clearly unwarranted invasion of privacy' is supported here solely by allegations of risk of violence."

Finding a clear public interest in disclosure, Hamilton indicated that "plaintiffs have shown that there has been extensive media coverage, editorials, and scholarly works that have flowed from the prior public disclosure of the names, military units, and other information about SOA and WHINSEC personnel. This use of the information is indicative of the public interest in disclosure and knowing what the government is up to." (*Theresa Cameranesi, et al. v. U.S. Department of Defense*, Civil Action No. 12-0595 PJH, U.S. District Court for the Northern District of California, Apr. 22)

Views from the States…

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

Kentucky

The Attorney General has ruled that the Murray State University Board of Regents violated the Open Meetings Act by discussing public business during a social gathering at the home of one of the regents the evening before a scheduled meeting. Although the University argued that no decisions were made as the result of the gathering, the AG pointed out that "regardless of whether any nexus between the March 14 discussion and the March 15 action exists or can be conclusively established in this forum, or any discrepancies exist regarding the extent to which certain topics were discussed, the record on appeal establishes that a quorum of the Board impermissibly discussed public business." Noting that the supreme court had ruled that "public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action," the AG indicated that "our conclusion is not altered by the fact that no discussion was held 'on the 14th of how any vote should or would be cast, no attempt to persuade anyone to change a vote, and no type of straw vote.' A violation was committed regardless of whether the March 15 motion resulted from any 'collective decision' by the Regents present on March 14." (13-OMD-057, Office of the Attorney General, Commonwealth of Kentucky, Apr. 17)

Ohio

The supreme court has ruled that lease agreement information for tenants at Findlay Market of Cincinnati is protected by the confidential business exemption. Although the appeals court had ruled that the Corporation for Findlay Market was subject to the Public Records Act, the supreme court concluded that since the lease agreements, which were the only records still in dispute, were protected, there was no need to rule on whether the Corporation qualified as the functional equivalent of a public agency. The court agreed with the corporation's expert that "the redacted information derives independent economic value from not being generally known or readily ascertainable by others who might obtain economic advantage from knowing the information." Noting that the Corporation had not adopted a written policy on protecting such information, the supreme court nevertheless pointed out that "although it is a close question, the corporation has taken

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reasonable measures to keep the lease terms a secret under the standard precautions for the industry." (*State ex rel. Kevin Luken v. Corporation for Findlay Market of Cincinnati*, No. 2012-0992, Ohio Supreme Court, Apr. 24)

Pennsylvania

A court of appeals has ruled that, although the Office of Open Records erred in finding that descriptions of meetings between the Governor and others did not qualify for the deliberative process privilege, the Governor's Office failed to justify its privilege claim and must disclose the withheld entries in the Governor's calendar requested by reporter Mark Scolforo. The Governor's Office withheld 17 emails and Scolforo appealed to the Office of Open Records. The Governor's Office asked for a hearing, which was denied by OOR because it did not hold hearings on whether sufficient evidence to support an exemption claim had been supplied. OOR ruled against the Governor's Office, finding that descriptions of meetings alone did not qualify as being deliberative. The court found that OOR should have reviewed the affidavits provided by the Governor's Office. The court noted that "while often information appearing on calendars would not contain information subject to protections, we must look at the substance of the information and not the form in which the information is placed. The fact that information is contained on the Calendars, instead of a memo, does not determine the character of the information or whether it is subject to an exception. As such, the fact that the information was placed on the Calendars does not, as a matter of law, mean that it is impossible for it to be protected under an exception to the [Right to Know Law]." Explaining why review of the affidavit of the Governor's Office was important, the court observed that "here, the content of the redactions is contested, and the Governor's Office is entitled to show why its asserted protection applies. . .In deciding whether this redacted information qualifies for protection under an exception, the OOR should have considered the averments of the Affidavit; the OOR could not make an informed decision here without knowledge of the content of the Affidavit." Finding that the affidavits should have been considered, the court nevertheless concluded that they were inadequate to support the position of the Governor's Office. The court pointed out that "while the Affidavit tracks the language of the exception it presupposes, rather than proves with sufficient detail, that the redacted Calendar entries are reflective of internal deliberations and, therefore, exempt from disclosure. It is not enough to include in the Affidavit a list of subjects to which internal deliberations may have related." (*Office of the Governor v. Mark Scolforo*, No. 739 C.D. 2011, Pennsylvania Commonwealth Court, Apr. 23)

A court of appeals has affirmed the supreme court's ruling that there is no constitutionally-protected expectation of privacy in home addresses of government employees. Ruling in a case involving a request for contact information of an employee in the Office of the Lieutenant Governor, the court noted that "because there is no constitutional privacy right in one's home address, any previous privacy exception for that information was based only in statute. There is no language in the current [Right to Know Law's] personal security exception that requires the agency to balance personal security interests against the benefit of disclosure. In the absence of such express language, this Court cannot adopt the balancing test utilized under the prior version of the RTKL. Accordingly, the OLG's contention that Requester has the burden of providing that the public need for disclosure of an employee's home address outweighs that employee's privacy interests is without merit." However, the court found that secondary email addresses of employees in the Lieutenant Governor's Office were protected by the personal privacy exemption. The court pointed out that "while the secondary e-mail address in question is used to conduct agency business, it still falls within. . .the RTKL's exemption of 'a record containing all or part of a person's. . .personal e-mail address' because even though it is being used to transact public business, nonetheless, it is still personal to that person. We note that other than the identification of the e-mail address in question, a requester would clearly have the ability to request e-mails from that account under the RTKL, provided they were not exempt from disclosure." (*Office of the Lieutenant Governor v. Daniel Mohn*, No. 1167 C.D. 2012, Pennsylvania Commonwealth Court, Apr. 24)

The Federal Courts…

Judge James Boasberg has applied the holding in the D.C. Circuit's recent decision, *CREW v. FEC*, 2013 WL 1296289 (D.C. Cir. Apr. 2, 2013), in which the court ruled that a requester is considered to have constructively exhausted his or her administrative remedies once the agency fails to respond within the statutory time limit. However, in finding that prisoner Samuel Acosta constructively **exhausted administrative remedies** when EOUSA referred his request to the FBI eight months after its receipt and the FBI responded to Acosta three months later, Boasberg appears to have identified a conflict between the *CREW* decision and the D.C. Circuit's earlier decision in *Oglesby v. Dept of the Army*, requiring a requester to file an administrative appeal if the agency responds before the requester files suit. Unraveling a request Acosta sent to a number of different agencies pertaining to records from his federal criminal prosecution in Iowa, Boasberg first found that both Immigration and Customs Enforcement and the Drug Enforcement Administration had responded to Acosta that they had no responsive records within the statutory time limit and that because he had not appealed to either agency he had failed to exhaust his administrative remedies. But Acosta's request to EOUSA, which ultimately was referred to the FBI, was a different matter. Boasberg noted that Acosta's request was referred to the FBI eight months after it was sent and that the FBI released some records three months later on Sept. 26, 2011. However, Acosta did not file suit until September 2012, a year after receiving the FBI's response. Boasberg pointed out that "although the Government asserts that Plaintiff failed to exhaust his administrative remedies by not appealing the FBI's September 26, 211, decision, such an argument ignores the nearly one-year delay between his request and a response. Under *CREW* such lapse waives any requirement Plaintiff had to exhaust his administrative appeals." (*Samuel Acosta v. Federal Bureau of Investigation*, Civil Action No. 12-1578 (JEB), U.S. District Court for the District of Columbia, Apr. 17)

A federal court in Florida has ruled that the Navy conducted an **adequate search** for records of the investigation of a 40-year-old crash of a Navy jet in Alameda, California and that portions of the report were properly withheld under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Free-lance journalist Theodore Karantsalis requested the report twice and the Navy told him both times that it was unable to locate an investigative report prepared by a Judge Advocate. However, the agency did find an aviation mishap report. Upholding the adequacy of the agency's search, the court noted that "the documents Plaintiff sought were, at the time, almost forty years old and had been relocated at least once each. Defendant successfully located the aviation mishap report and, under the circumstances, Defendant's efforts to locate the missing JAG report were reasonable." The Navy withheld witness statements and opinions under Exemption 5. The court explained that "these are covered by the *Machin* privilege [recognized by the Supreme Court in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984)] and thus need not be disclosed pursuant to Exemption 5." The court also affirmed withholding third party personal information under Exemption 6. (*Theodore D. Karantsalis v. Department of the Navy*, Civil Action No. 12-23469-CIV-KING, U.S. District Court for the Southern District of Florida, Miami Division, Apr. 24)

A federal court in New Hampshire has ruled that ICE properly withheld names and addresses of six individuals picked up in New Hampshire during the agency's Operation Cross Check project designed to arrest criminal aliens under **Exemption 7(C) (invasion of privacy concerning law enforcement records).** While the agency provided information indicating the current status of the six individuals, it refused to

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disclose their names and addresses. The Union Leader argued that the names should be disclosed because they were public under state law. But the court noted that "states are free to disclose such records if they choose, but the federal government is not bound to follow their lead." The newspaper also argued that disclosure was in the public interest because it would allow the public to find more relevant information. Rejecting this "derivative use" claim, the court pointed out that "the FOIA does not require the government to disclose the names of arrestees under such circumstances." The court added that "nothing prevents the arrestees from identifying themselves, disclosing the fact that they were arrested, or disclosing the circumstances of their arrests. Because the Union Leader has not explained how more would be revealed about the government's conduct during Operation Cross Check if the names and addresses were disclosed. . .any additional information that could be gained from disclosure of the names and addresses is merely speculative and does not outweigh the individuals' privacy interest." (*Union Leader Corporation v. U.S. Department of Homeland Security*, Civil Action No. 12-cv-134-PB, U.S. District Court for the District of New Hampshire, Apr. 18)

A federal court in Ohio has ruled that prisoner Hany Iskander has not shown that he **exhausted administrative remedies** for his requests to the FBI and ICE, but that he has shown constructive exhaustion of his administrative remedies against the Department of Health and Human Services and may proceed with his suit against that agency. Although it was unclear what Iskander requested from the FBI, the record indicated that the agency had provided him with 365 pages. Iskander alleged he had appealed the FBI's decision, but did not provide any further information concerning the appeal. The court noted that "there is no way for the Court to determine from Plaintiff's conclusory statements whether he timely appealed the agency's response within the sixty days allotted by the agency's regulations and whether he sent his request to the property component of the agency designated to receive FOIA appeals." ICE furnished Iskander with 380 pages and, again, the court found no evidence that he had appealed the decision. As to Iskander's claims that the agency had improperly withheld information, the court pointed out that "he does not indicate what information the agency was unable to locate or produce. A claim pertaining to the adequacy of the search would require the Court to speculate on essential facts which Plaintiff did not provide in his pleading. A claim which merely suggests the possibility that the Defendant may have wronged the Plaintiff does not state a claim upon which relief may be granted." HHS's only response to Iskander was that it was searching for responsive records. Allowing him to continue with his suit against HHS, the court observed that "because the allegations show that DHHS simply never acted on Plaintiff's request, Plaintiff states a viable claim under FOIA against this Defendant." (*Hany M. Iskander v. Federal Bureau of Investigation*, Civil Action No. 4:12CV02653, U.S. District Court for the Northern District of Ohio, Eastern Division, Apr. 12)

A federal magistrate judge in California has recommended that Jasdev Singh's **Privacy Act** suit be dismissed because he failed to **exhaust administrative remedies** for appealing Homeland Security's lack of response to his amendment request and because he had failed to provide sufficient evidence for his other claims dealing with dissemination and maintenance. However, the magistrate judge also found that the Privacy Act's exhaustion requirements did not constitute a jurisdictional bar against hearing Singh's claim and that, further, the Prison Litigation Reform Act also did not pose a bar to Singh's litigation against Homeland Security. Because Singh had previously been granted asylum, he was told by an ICE agent that if he pled guilty to criminal charges he would not face deportation. Singh pled guilty and was placed in a minimum security prison near where he lived. However, ICE issued an immigration detainer, which caused Singh to be re-categorized for Bureau of Prisons purposes as a deportable alien, resulting in his being moved to a facility in Mississippi. Based on an inquiry to the warden of the Mississippi facility, Singh sent two amendment requests asking that the immigration detainer be removed from his records to an address in Jena, Louisiana. After hearing nothing, he sent another letter to an address in Bakersfield, California. Singh ultimately filed suit for violation of the Privacy Act. DHS initially claimed that because Singh had not appealed his

amendment denial the court did not have jurisdiction to hear the claim. The court disagreed, noting that "the Privacy Act conditions suit under Section 552a(g)(1)(A) on an agency making a determination under subjection (d)(3) (whether to amend the records), but it does not unequivocally limit the federal court's subject-matter jurisdiction in the absence of such an agency determination or predicate jurisdiction on it. While the Privacy Act expressly vests federal district court with jurisdiction over all civil Privacy Act claims brought under subsection 552a(g)(1), it does not expressly limit or define federal court jurisdiction relative to exhaustion of administrative remedies." The magistrate judge added that "the statute only states that whenever any agency makes a determination under subsection (d)(3) of this section, then an individual may bring a civil action against the agency." But because Singh had sent his amendment requests to the wrong addresses, the magistrate judge noted that "Plaintiff has failed to properly initiate the procedure for administrative consideration of his amendment request." Singh argued that he had no Internet access and was unable to verify that the information given by the warden was correct. However, the magistrate judge pointed out he had a copy of the agency's regulations containing the appropriate address. Singh also argued that he had exhausted his administrative remedies during the litigation. But the magistrate judge observed that "exhausting remedies during the pendency of the lawsuit does not serve the underlying policy objectives of exhaustion. . .[T]o achieve the policy objectives of the Privacy Act's exhaustion requirement, exhaustion must occur *before filing suit*, not simply at a time prior to judgment." The magistrate judge also dismissed the government's claim that, as a prisoner, Singh was required to first pursue his remedies under the Prisoner Litigation Reform Act. The magistrate judge explained that 'this suit is against DHS, and not BOP, for correction of records pertaining to an immigration detainer that was issued *outside* Plaintiff's prison; it is not a suit regarding the conditions of Plaintiff's confinement." (*Jasdev Singh v. United States Department of Homeland Security*, Civil Action No. 1:12-cv-00498-AWI-SKO, U.S. District Court for the Eastern District of California, Apr. 19)

A federal court in California has ruled that Haipung Su failed to show that NASA violated the **Privacy Act** or Su's constitutional right of informational privacy when he was debarred from working at a NASA facility because an FBI investigation found that he posed a security risk. Su who was a staff scientist at the University of California, Santa Cruz, was working as a contractor in the Earth Sciences Division at NASA Ames. He was investigated by the FBI, which indicated that he had failed a polygraph test and was considered a security risk. During a meeting in which Su's debarment from the Ames facility was discussed, Robert Dolci, NASA Ames' Chief of Protective Services, allegedly told attendees that Su was debarred for failing a polygraph test and implied that he was working for a foreign government. Although Su was barred from the Ames facility, he continued to work on the contract and was assigned to work on a project at the University of California at Davis as well. Su did not suffer any loss of income or benefits, but sued the agency for violation of the Privacy Act, other statutes, and constitutional violations. The court quickly dismissed Su's Privacy Act claims in light of the Supreme Court's recent decision in *FAA v. Cooper*, 132 S. Ct. 1446 (2012), in which the Court ruled that only pecuniary damages could be recovered under the Privacy Act. The court noted that "Su has not presented any evidence that his change in job duties and resulting commute costs [to Davis] resulted from Dolci's *disclosures* regarding the reasons for his debarment rather than the *debarment itself*." As to the loss of future income, the court observed that "it appears that Su is engaging in mere speculation when he projects losses that he might incur *if* he were to lose his job and *if* he were unable to obtain another job." In dismissing the informational privacy claim, the court agreed that the fact that Su had been debarred from Ames would be available to other agencies if Su underwent a background investigation in the future. But the court indicated that "the fact that another federal facility would be informed of his debarment does not indicated that *Dolci* or other NASA officials are likely to make future disclosures as to the *reasons* for Su's debarment." (*Haiping Su v. National Aeronautics and Space Administration*, Civil Action No. 5:09-cv-02838-EJD, U.S. District Court for the Northern District of California, San Jose Division, Apr. 17)

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