Volume 40, Number 12
June 4, 2014

ACCESS REPORTS
FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

Editor/Publisher:
Harry A. Hammitt
Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

ISSN 0364-7625.

Washington Focus: Following publication of model FOIA regulations developed by a collaboration between CREW, EPIC, and the National Security Archive, the Justice Department's Office of Information Policy has begun a series of inter-agency discussions to consider how government-wide FOIA regulations could be made more consistent and more understandable for requesters. Josh Hicks, blogging for the Washington Post, noted that "the disparate regulations currently in place have tended to frustrate information seekers. The inter-agency discussions are meant to develop a common set of practices that would make navigating the system simpler for information requesters, in addition to helping the government update its regulations with greater ease." While consistent and clear FOIA regulations would be beneficial both for agencies and requesters, any legal action to force agencies to change their FOIA regulations is limited to those amendments to FOIA in which Congress has required agencies to promulgate regulations. However, the FOIA amendments recently passed by the House (H.R. 1211) include a provision requiring agencies to update their FOIA regulations that would likely provide the basis for a legal challenge if adopted.

D.C. Circuit Rules Transfer to NARA Does Not Affect FOIA Status of Records

In a decision that directly addresses the issue for the first time, the D.C. Circuit has ruled that records originating from a government entity not covered by FOIA do not become subject to FOIA merely because they are deposited at the National Archives and Records Administration. Writing for the Court, Senior Circuit Court Judge A. Raymond Randolph explained that "FOIA does not define 'agency records,' but we are confident that Congress did not intend to expose legislative branch material to FOIA simply because the material has been deposited with the Archives."

The case involved a request to NARA from Cause of Action certain records of the Financial Crisis Inquiry Commission, a legislative branch creation designed to study the causes of the 2008 financial crisis. The Commission was

ACCESS REPORTS

established in 2009 and was required to report its conclusions to Congress and the President by December 15, 2010 and terminate 60 days later. Shortly before it disbanded, the Commission transferred its records to NARA. The Commission Chair told NARA that because it was a congressionally-created body, "FOIA will not apply to the Commission records even after they are transferred" to the Archives. The Commission Chair requested that NARA restrict access to any Commission records not already available online until five years from the date when the Commission shut down and that during those five years NARA "conduct a systematic review of the records that are not currently available to the public with the goal of releasing as much information as is allowable" in 2016. Cause of Action requested certain Commission records, arguing that once the records were transferred to NARA they became subject to FOIA disclosure. NARA denied the request, finding that since the Commission was created by the legislative branch its records were not subject to FOIA. NARA concluded that transferring the records to NARA was not "dispositive of the FOIA access question." The district court used a four-factor test from *Burka v. Dept of Health and Human Services*, 86 F.3d 508 (D.C. Cir.1996), to analyze the degree of agency control over the records. The four factors looked at (1) the intent of the creator to retain or relinquish control, (2) the ability of the agency to use and dispose of the records at it saw fit, (3) the extent to which agency personnel had read or relied on the records, and (4) the degree to which the records were integrated into the agency's filing system. After reviewing the *Burka* factors, the district court concluded the records were not agency records.

At the D.C. Circuit, NARA argued that "when a legislative commission transfers its records to the National Archives, the FOIA status of those records is not altered. In other words, a document subject to FOIA before the Archives received it remains subject to FOIA after it arrives; a document exempt from FOIA before the Archives received it remains exempt after it arrives. The Commission's records, when created in the legislative branch, were not subject to FOIA. According to this argument, they remained exempt after the Commission deposited them with the Archives."

Randolph pointed out that "although we have never explicitly held that transferring a document to the Archives does not affect the document's FOIA status, we suggested as much in *Katz v. National Archives*, 68 F.3d 1438 (D.C. Cir. 1995). There, we considered whether autopsy photographs of President Kennedy transferred to the National Archives were agency records subject to FOIA. We held they were not, in part because they were 'personal presidential materials when they were first created, and therefore at no time were they *ever* agency records.' In other words, the depositing of these materials with the Archives did not convert them into 'agency records' subject to FOIA."

Cause of Action argued the court should look to the four factors in *Burka* to conclude that NARA had control over the records. Randolph indicated that "'control' became a consideration in FOIA cases as a result of the need to distinguish agency records from 'personal materials in an employee's possession, even though the materials may be physically located at the agency.'" Observing that "we have questioned whether the *Burka* test is helpful in delineating this question," Randolph noted that "in any event, applying the test in this case is particularly problematic because documents deposited with the National Archives do not present the sort of questions the *Burka* test purports to answer."

Indeed, Randolph explained, "as applied to the Archives, the four-factor test is divorced from FOIA's key objective—revealing to the public how federal agencies operate." He pointed out that "in order to catalog and file documents delivered from Congress or, for example, the Supreme Court, archivists review the documents and make preservation decisions. We may assume that, once those decisions are made, the records are 'integrated' into the Archives' 'files.' But those typical archival functions—common to every record in the Archives—do not suddenly convert the records of a defunct legislative commission into 'agency records' able to expose the operations of the Archives 'to the light of public scrutiny.'"

Randolph found the control test to be irrelevant to documents transferred to NARA. He observed that "in order for a document to be considered an 'agency record,' there must be some relationship between the record and the FOIA-covered agency. This relationship has been described as one of 'possession' or 'control.' And we have looked to possession and control because, often these concepts capture the nature and use of a document as it changes hands among federal agencies." But, Randolph noted, "The main function of the Archives is to preserve documents of enduring value from all three branches of government. The Archives does not use documents created in the three branches in any operational way, or indeed in any way comparable to any other federal agency. It may control them in a sense, but its control consists in cataloguing, storing, and preserving, not unlike a 'warehouse.' Variances in this sort of 'control' are entirely unhelpful in determining a record's value to a FOIA requester, and irrelevant to any withholding prerogative that may remain with the transferor." (*Cause of Action v. National Archives and Records Administration*, No. 13-5127, U.S. Court of Appeals for the District of Columbia, May 23)

Views from the States…

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

California

The Supreme Court has ruled that the names of Long Beach police officers involved in shootings are not protected by the law-enforcement personnel exemption or by the exemption for invasion of privacy. After the shooting death of Douglas Zerby, who was shot and killed by two police officers after brandishing what appeared to be a gun but turned out to be a garden hose spray attachment, The *Los Angeles Times* requested the names of all officers involved in shootings between 2005-2011. When notified of the request by the city, the police officers union filed suit to block disclosure, arguing that such records fell within statutory exemptions for law enforcement personnel records. The trial court ruled against the union. The union appealed and was joined by the city. The court of appeals upheld the trial court's decision and the case went to the Supreme Court. The court looked at two earlier decisions, *Copley Press v. Superior Court* (2006) and *Commission on Peace Officer Standards and Training v. Superior Court* (2007), ruling on what kinds of records qualified for protection under the law enforcement personnel exemption. In *Copley*, the court found that records of an administrative appeal of a personnel matter were covered, while in *Commission on Peace Officer Standards*, the court concluded that information held by an entity that did not employ any police officers did not qualify as personnel records, and that such data was protected only to the extent specifically enumerated in the Penal Code. Here, the court noted that "it may be true that such shootings are routinely investigated by the employing agency, resulting eventually in some sort of officer appraisal or discipline. But only the records *generated* in connection with that appraisal or discipline would come within the statutory definition of personnel records." The court added that "disclosing the names of officers involved in various shootings would not imply that those shootings resulted in disciplinary action against the officers, and it would not link those names to any confidential personnel matters or other protected information." The court pointed out that the public interest in knowing the identities of officers involved in shootings was significant. The court explained that "in a case such as this one, which concerns officer-involved shootings, the public's interest in the conduct of its peace officers is particularly great because the shootings often lead to severe injury or death. Here, therefore, in weighing the competing interests, the balance tips strongly in favor of identity disclosure and against the personal privacy interests of the officers involved." Recognizing that the balance could tip the other way depending on the specific circumstances, the court observed that the union and

ACCESS REPORTS

the city had failed to show that the privacy interests outweighed the public interest "where the Union and the City relied on only a few vaguely worded declarations making only general assertions about the risks officers face after a shooting." The court indicated that "the Union and the City sought a blanket rule preventing the disclosure of officer names *every time* an officer is involved in a shooting. . .We reject that blanket rule." (*Long Beach Police Officers Association v. City of Long Beach; Los Angeles Times Communications LLC, Real Party in Interest*, No. S200872, California Supreme Court, May 29)

A court of appeals has ruled that HR Management Corporation, an unsuccessful bidder for a contract solicited by Contra Costa County for employment services for former inmates as part of the county's community corrections programs, is not entitled to attorney's fees for its suit against the county to force the county to disclose the proposals of the two successful bidders before the contract was awarded. After learning that its bid had not been successful, HR Management filed a Public Records Act request with the county for all records pertaining to the two successful bids. The county told HR Management that it would disclose all the records but would not disclose the successful proposals until the board of supervisors officially awarded the contract the following week. HR Management then filed suit to force the county to disclose the records more quickly, but agreed to receive the records on the county's terms. The records were disclosed after the board of supervisors meeting and after a ten-day appeal period expired, the county finalized the contracts. The county filed its response to HR Management's original action, claiming the issue was now moot because it had disclosed all the records. The trial court dismissed HR Management's petition and denied the company attorney's fees. HR Management then appealed. Finding the only issuing remaining was whether HR Management was entitled to attorney's fees, the appeals court pointed out that "the [trial] court did not require the County to immediately disclose the documents that were in dispute but, with the County's approval, ordered the documents produced prior to the *execution* of the contracts, and ordered the execution of the contract stayed for 72 hours after all responsive records were produced. Thus, it appears the order granting the writ simply directed the County to do what it was already willing to do" and did not cause the County to change its position in any way. (*HR Management Corp., Inc. v. County of Contra Costa*, No. A139841, California Court of Appeal, First District, Division 5, May 29)

Connecticut

A trial court has ruled that the Department of Labor has not shown that records of a wage violation investigation involving Realgy Energy Services are categorically exempt, but has instead agreed with the FOI Commission that internal emails requested by Realgy can be redacted to the extent they might reveal the identities of witnesses or informants. In response to a request from Realgy, the department contended the emails were completely exempt under the exception to protect the identities of witnesses and informants and the exception for strategy and negotiations pertaining to pending litigation. In finding that the department had not shown that the emails were categorically exempt, the trial court noted that "the fact that exempt information 'probably' or 'typically' is in a records falls short of satisfying claimant's obligation to provide evidence proving the applicability of an exemption to the document at issue." As to the strategy and negotiations exemption, the court pointed out that "the only evidence cited by the plaintiffs regarding strategy was the fact that DOL issued an investigative subpoena to Realgy for wage records. From these facts the plaintiffs leap to the unsupported conclusion that the internal e-mails must refer to DOL's strategy and negotiations about the pending investigation. It may well be that some of the e-mails involved discussions of strategy and negotiations. Based on the record before the FOIC, we simply do not know if they do, and if they do, which ones do. Without such evidence, the plaintiffs have not met their burden of proving the applicability of the statutory exemption." (*Commissioner, State of Connecticut Department of Labor v. Freedom of Information Commission*, No. HHB-CV-13-6020970, Connecticut Superior Court, Judicial District of New Britain,
May 22)

Illinois

The Supreme Court has ruled that State's Attorneys are part of the executive branch and are subject to FOIA. In response to requests filed by reporter Larry Nelson, the Kendall County State's Attorney told Nelson that it had already furnished the records he was requesting and that, further, the State Attorney's Office was not subject to FOIA because it was part of the judicial branch. A trial court agreed with the State Attorney and a court of appeals concluded that because a 2010 amendment to the State's Attorneys Appellate Prosecutor's Act specifically characterized the State's Attorney as a "judicial agency of state government," the State's Attorney was no longer subject to FOIA. Calling this conclusion "untenable," the Supreme Court reversed, noting that "there is no sense, however, in which State's Attorneys can be regarded as part of the judiciary or the judicial branch." The court pointed out that, while State's Attorneys had been found to be included in the final section of the Judicial Article of the Illinois Constitution for compensation purposes, "we have never suggested, however, that the office of State's Attorney is in any way part of the judiciary." The court explained that "such a characterization would also require that we jettison the substantial and well-established body of case law which holds that State's Attorneys exercise executive powers, and that the office of State's Attorney is part of the executive branch of State Government. This we will not do." Turning to the court of appeal's conclusion that the Appellate Prosecutor's Act amendment placed the State Attorneys within the judicial branch, the Supreme Court pointed out that "that statute pertains solely to the agency governing appellate prosecutors. It has no bearing whatever on the legal status of the office of State's Attorney, nor does it propose to alter in any way the obligations of State's Attorneys under the FOIA, the statute before us here." (*Larry Nelson v. Kendall County*, No. 116303, Illinois Supreme Court, May 22)

Virginia

The staff of the FOI Advisory Council has found that suicide reports are criminal investigative records and can be withheld under the exemption for such records. Responding to an inquiry from television reporter Mike Mather concerning a denial of access by the City of Norfolk to suicide reports because they were criminal investigative records, the staff acknowledged an apparent conflict between the criminal investigative files exemption and a the definition in a separate statutory provision requiring certain law enforcement agencies to retain certain non-criminal records, including suicide reports. The staff pointed out that suicide was recognized as a common law crime in Virginia and, thus, law enforcement investigations of suicides qualified as criminal investigative records and could be withheld. The staff indicated, however, that unless a separate statutory provision prohibited disclosure, agencies could disclose such records as a matter of discretion. In response to Mather's query as to whether such records could be withheld in perpetuity, the staff pointed out that "neither the criminal investigative files exemption nor non-criminal records exemption is limited by time. Therefore, if either exemption applies, its use is not limited by the age of the records or the amount of time that may have passed since the incident occurred." Addressing Mather's query concerning whether records labeled as criminal initially would then become disclosable if the law enforcement agency concluded that incident was non-criminal, the staff indicated that "if one were to request investigative records [while the investigation was being considered a criminal matter], they would be subject to the criminal investigative files exemption. . .However, any records of the matter addressing it as a non-criminal incident, after the determination was made that no criminal activity occurred, would have to be treated as non-criminal records." (Opinion AO-04-14, FOI Advisory Council, Commonwealth of Virginia, May 22)

ACCESS REPORTS

Wisconsin

A court of appeals has ruled that the Racine *Journal-Times* is eligible for attorney's fees for its suit against the City of Racine Board of Police and Fire Commissioners under the Open Meetings Law to require the commission to disclose the votes of its members concerning its decision to reopen the job search for a new police chief after one of the three finalists dropped out. Relying on the provision in the Open Meetings Law requiring public bodies to record and disclose all votes pursuant to the provisions of the Open Records Law, the newspaper requested a copy of the commissioners' vote. The commission told the newspaper that it considered the vote part of its deliberations and exempt under the Open Records Law. The commission then told the newspaper that it could not provide the information because of security concerns. Unsatisfied with the commission's explanation, the newspaper filed suit. Six days later, the commission disclosed how each commissioner voted in an email. But in a response to the newspaper's request two months later, the commission indicated that no record of the votes existed. The newspaper argued the commission was estopped from arguing that no record existed, but the trial court found the case was moot and dismissed it. The court of appeals found that the commission was estopped from arguing for the first time that no record existed and that the newspaper was eligible for attorney's fees. The court pointed out that "the fact that the Newspaper's records request became moot when the Commission provided the information, however, does not mandate dismissal of the entire action. The Newspaper still has a viable claim for attorney fees and costs if the litigation 'was *a* cause, not *the* cause' of the Commission's release." The court found the newspaper relied on the commission's assertions to its detriment. The court observed that "employing equitable estoppel under these egregious facts benefits the public interest in transparency in government. . .Had the Commission been forthright in its dealings with the Newspaper, this litigation might have been avoided altogether, conserving the Commission's resources as well as the Newspaper's." (*Journal Times v. City of Racine Board of Police and Fire Commissioners*, No. 2013AP1715, Wisconsin Court of Appeals, May 28)

The Federal Courts…

Judge Christopher Cooper has ruled that the Defense Finance and Accounting Service Agency conducted an **adequate search** when it told the law firm of Snider and Associates that it could not search its database for payroll records of certain civilian employees at Norfolk Naval Shipyard without their social security numbers. When DFAS responded that it was unable to search the database most likely to contain the payroll data without social security numbers, Snider and Associates filed suit, arguing that the firm had previously obtained such information from other DFAS client agencies and that a three-year-old email from the Norfolk Naval Shipyard's General Counsel indicating that DFAS was willing to provide the shipyard with such information proved that DFAS could locate the information without a social security number. Neither argument, however, persuaded Cooper. He pointed out that "although terse, DFAS's affidavits are specific enough to enable the Court to determine that an adequate search was performed." He added that the agency's declaration that "only [its Defense Civilian Payroll System] is likely to contain responsive records and that it requires social security numbers—coupled with the position within DFAS [of the declarant] and his explanation that DCPS is the only record system likely to contain Department of the Navy civilian employee records—are sufficient to establish that DFAS conducted an adequate search." He rejected the claim of one of the law firm's IT employees that other agencies had provided such information without the need for social security numbers. Cooper explained that "Snider's purposed receipt of similar information from other entities without providing social security numbers fails to establish that *DFAS* does not require social security numbers to search *its* database because these other entities are all distinct organizations with distinct systems." Cooper also rejected the argument that an email from the General Counsel at the Naval Shipyard supported the law firm's claim that the data was available. Cooper pointed out that David Bach, the employee in the General

Counsel's Office at the Naval Shipyard who wrote the email "does not work for DFAS; his email does not explain who at DFAS agreed to make these calculations; and, apparently no one from DFAS has provided these calculations to Bach in the more-than three years since his email." (*Law Offices of Snider and Associates, LLC v. Robert M. Gates, et al.*, Civil Action No. 10-01822 (CRC), U.S. District Court for the District of Columbia, May 28)

A federal court in Louisiana has ruled that neither the Executive Office for Immigration Review at the Justice Department nor Immigration and Customs Enforcement have shown that they conducted an **adequate search** for records related to a complaint filed with the Louisiana Attorney Disciplinary Board by EOIR Disciplinary Counsel Jennifer Barnes. The court noted that the ICE declaration "does not explain the nature of the search conducted, including whether both electronic and paper files were searched, or who conducted the searches. Nor does it address whether other ICE offices likely (even if not 'most likely') have responsive records. For instance, the documents produced to Plaintiff suggest the involvement of ICE personnel working in both New Orleans and Washington, D.C. It is not evident to the Court whether ICE offices in both cities were considered as likely repositories of responsive documents." As to the EOIR search, the court pointed out that "although the Court recognizes that government agencies certainly are not required to search every record system, a reasonable search should account for components that 'likely' have responsive documents, but fall short of 'most likely' status." Immigration attorney Michael Gahagan claimed EOIR had improperly referred a document to ICE for direct response. But the court observed that it found no error "in EOIR's determination that ICE should have an opportunity to review and assert any exemptions believed appropriate prior to the document's disclosure. In other words, any entitlement Plaintiff may have to an unredacted version of the document should and shall be premised on a determination of the applicability of claimed exemptions, not the particular government agency file in which the document was found." (*Michael Gahagan v. United States Department of Justice*, Civil Action No. 13-5526, U.S. District Court for the Eastern District of Louisiana, May 23)

` A federal court in Arizona has ruled that Daniel Rigmaiden is not entitled to **discovery** in his FOIA case because discovery is available only to help defend against a motion for summary judgment, not to support a motion for summary judgment. Rigmaiden asked for discovery to authenticate documents he had referred to in his motion for summary judgment and to learn more about the FBI's ability to disclose metadata for electronic records. Rigmaiden argued that his discovery request served a dual purpose, allowing him not only to support his summary judgment motion, but to defend against the FBI's motion as well. But the court noted that Rigmaiden "does not identity which *specific* documents submitted with his motion for partial summary judgment are necessary for him to defeat Defendants' cross motion for summary judgment. . .[H]is statement of facts. . .refers to thousands of pages of documents, numerous websites, articles. . .Although Plaintiff asserts that he seeks discovery to authenticate documents that serve a 'dual purpose,' the Court concludes that Plaintiff seeks discovery to authenticate documents to support his motion for partial summary judgment." Because the agency challenged the admissibility of many of Rigmaiden's documents, the court pointed out that "even if the Court granted Plaintiff's motion and he obtained discovery to authenticate the documents at issue, that information would not address Defendants' other objections and thus would not ensure the admissibility of the documents. Thus, the additional discovery that Plaintiff seeks would not preclude summary judgment." The court then found that discovery concerning the ability of the agency to disclose metadata was inappropriate as well. The court noted that "Defendants argue that metadata is not a record subject to FOIA. The Court agrees that whether metadata is subject to FOIA is a legal issue. Accordingly, Plaintiff does not need discovery regarding Defendants' ability to provide records in native format with metadata intact to defend against Defendant's cross motion for summary judgment." (*Daniel David*

ACCESS REPORTS

Rigmaiden v. Federal Bureau of Investigation, Civil Action No. 12-01605-PHX-SRB (BSB), U.S. District Court for the District of Arizona, May 13)

■ ■ ■

Access Reports is no longer available in hard-copy and is available only via email in Word or PDF versions. Subscribers who have been receiving *Access Reports* in hard-copy need to provide an email address for future deliveries and identify the format in which they want to continue to receive the newsletter. Email addresses and choice of format can be sent to hhammitt@accessreports.com or by calling (434) 384-5334.