Volume 40, Number 18
September 10, 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: Steve Aftergood reports in Secrecy News that ISCAP recently granted 50-year exemptions for a variety of records, including security specifications for the gold bullion repository at Fort Knox. John Fitzpatrick, director of the Information Security Oversight Office, told Aftergood that "blanket exemptions were not approved." He indicated that ISCAP "often required agencies to make specific changes to their proposed declassification guide before granting approval" of the exemptions. He added that "during the evaluation of agency exemptions the ISCAP required that certain agencies significantly narrow their submissions. In some cases, the ISCAP required that an agency remove a requested exemption element."

Court Orders Disclosure of Redacted Personal Information

In a case with a very strong public interest narrative, a federal court in Philadelphia has ruled that the FBI must disclose the redacted portions of a 1966 memo of a conversation between Associate FBI Director Cartha DeLoach and Associate Supreme Court Justice Abe Fortas concerning a background investigation of the movie star George Hamilton, who had been dating Lynda Bird Johnson. The court also concluded that the FBI's policy of categorically denying access to records containing third-party information without a privacy waiver, proof of death, or a strong showing of public interest in disclosure violates FOIA.

The case involved a request from Villanova Law School Professor Tuan Samahon for records concerning the FBI's interactions with Fortas, a close confidante of President Lyndon Johnson, even after Johnson appointed him to the Supreme Court. The DeLoach memo, with identifying information about the individual to whom it referred redacted, had already been made public, but Samahon specifically requested an unredacted version of the memo. He also requested the file containing the memo, a file the FBI said pertained to a background check of the individual identified in the memo. The FBI refused to disclose any identifying information, claiming the records were protected by

ACCESS REPORTS

Exemption 6 (invasion of privacy) and Exemption 7(C) (invasion of privacy concerning law enforcement records). U.S. District Court Judge Eduardo Robreno ordered the agency to provide an unredacted version of the memo as well as the file for *in camera* review.

To place the records in context, Robreno explained that Johnson apparently asked Fortas to look into Hamilton's background because he was dating his daughter Lynda Bird. Johnson enlisted the FBI to conduct such a background check. The FBI turned up allegations of homosexuality, but no violations of the law, and the agency provided the information to Fortas. The DeLoach memo described a telephone conversation he had with Fortas on October 25, 1966, apparently about the Hamilton investigation. However, because Hamilton's personal information had been redacted, the public version of the memo took on a completely separate historical cast. DeLoach also memorialized an exchange with Fortas on the timing of the Supreme Court's decision in *Black v. United States*, 385 U.S. 26 (1966), a case that had implications for law enforcement. Fortas told DeLoach that the Court's decision would likely be announced shortly and that it would conclude that the case was not appropriate for Supreme Court review. Based on this exchange, DeLoach apparently concluded the case would be remanded and observed in the memo that the FBI would immediately check to find the identity of the lower court judge who had initially handled the case. The DeLoach memo also included an addendum in which DeLoach asserted that Fortas had not acted improperly or unethically in divulging information about the *Black* case. Viewed in this limited context, Samahon speculated that the deleted identity in the DeLoach memo referred to an individual to whom DeLoach had referred as a means of blackmailing Fortas into providing information about the *Black* case. Samahon's theory was given some credence by the fact that DeLoach had recounted the conversation with Fortas as being blatantly unethical in his published personal memoir.

After reviewing the documents *in camera*, Robreno concluded that neither privacy exemption applied and even though the DeLoach memo referenced Hamilton it shed much more light on the conduct of the FBI and Fortas than it did on Hamilton. Robreno explained that "when the DeLoach Memorandum is read in its unredacted form, however, the potential embarrassment [of being identified as the subject of an FBI investigation] described by the Government seems highly speculative, at best. The DeLoach Memorandum itself makes no reference to an FBI background investigation. Without the additional information supplied by the FBI, a reader of the DeLoach Memorandum would be aware only that DeLoach and Justice Fortas had discussed information about George Hamilton, not that the FBI had conducted a background investigation of him." Robreno pointed out that the record was nearly 50 years old and that "the mere presence of Hamilton's name in an FBI document is therefore unlikely—standing alone—to engender speculations that he was suspected of any criminal conduct." He added that much of the contextual information had already been made public in DeLoach's memoir as well as Hamilton's autobiography. Assessing Hamilton's privacy interest, Robreno observed that "the fact that he was the subject of a conversation between the FBI and Justice Fortas, that information is not particularly sensitive or embarrassing, involves events that occurred long ago, and has been revealed previously in a book that is available to the general public. . .Accordingly, Hamilton's interest in avoiding disclosure of the specific information in the DeLoach Memorandum (which tells the reader very little about Hamilton himself) is minimal, at best."

Turning to the public interest in disclosure, Robreno rejected Samahon's conjecture about the identity of the redacted individual, noting that 'the Court agrees with the Government that the redacted name and the Supreme Court's handling of the *Black* case were likely two unrelated subjects that Fortas and DeLoach happened to discuss in the same conversation. . .Plaintiff's blackmail theory is almost certainly incorrect." But he pointed out that "it does not follow, however, that, because the premise upon which the FOIA request was made is incorrect, disclosure of the redacted name serves no public interest." Instead, Robreno noted that the memo "reveals that senior FBI officials and a sitting Supreme Court Justice were involved in the investigation of the private life of an individual based upon the personal concern of the President. As the

Government put it, such a situation is 'highly unconventional' and it suggests a potentially illegal use of executive power, as well as an unusual (and likely improper) collaboration between two branches of government." Finding the public interest in disclosure far outweighed Hamilton's privacy interest, Robreno observed that "put simply, disclosure of the redacted name tells the public few personal details about the named individual, but reveals a great deal about the functioning of the Hoover FBI during the Johnson presidency."

Acknowledging that the bar to protecting personal information was somewhat lower under Exemption 7(C), Robreno first addressed whether or not the records qualified as law enforcement records. The government argued that because the FBI had authority to investigate individuals who would come into close proximity to Johnson the investigation of Hamilton was a legitimate law enforcement inquiry. Calling the claim "circular," Robreno noted that "it is possible for the FBI to have the authority to investigate private citizens who will be in close proximity to the president, but for the *actual* investigation the agency conducted to be unrelated to a 'legitimate law enforcement concern.'" He indicated that "the Government's current position that the investigation was for 'protection of the person of the president' seems to be a post-hoc rationalization of the agency's conduct rather than the genuine motive for the FBI's investigation." He added that "here, the FBI has asserted a statutory basis for its investigation that *could* be indicative of a legitimate law enforcement concern, but the evidence in this case shows just the opposite, revealing that the White House enlisted the FBI to conduct a personal inquiry into a private individual's background without any suggestion of a security threat." Although he concluded Exemption 7(C) did not apply because the records were not compiled for law enforcement purposes, he pointed out that he still found the public interest in disclosure outweighed any privacy protection under Exemption 7(C).

Robreno rejected the agency's claim that the contents of the file containing Hamilton's background investigation were categorically exempt under Exemption 7(C). Instead, he pointed out that "the Government cannot categorically withhold an entire FBI file on the basis that some of the information in the file is likely exempt from disclosure. Rather, after deleting the specific portions of the file that are exempt from disclosure, the FBI is required to release to a FOIA requester any 'reasonably segregable portion' of each record contained within the file. The Government has made no effort to demonstrate that it has fulfilled that obligation." Noting that "the file is overflowing with gossip, rumor, and third-level hearsay concerning potentially embarrassing allegations and personal details about private citizens," Robreno sent the file back to the FBI for a segregability review under Exemption 6. (*Tuan Samahon v. Federal Bureau of Investigation*, Civil Action No. 12-4839, U.S. District Court for the Eastern District of Pennsylvania, Aug. 25)

Views from the States…

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

California

A court of appeals has ruled that the San Jose City Council did not violate the Ralph M. Brown Act when it allegedly forged a consensus of the majority of members on whether to designate a Vietnamese business district in the city. The Vietnamese-American Community of Northern California alleged that in 2007 San Jose city council member Madison Nguyen had a chance encounter with city council member Forrest Williams during which Nguyen enlisted Williams' support for designating a Vietnamese business

ACCESS REPORTS

district. She later enlisted the support of four other city council members. The city council passed a resolution naming the area the Saigon Business District. Because of resistance to that name, the city council rescinded the resolution in 2008 and indicated that the name of any future business district should be decided by members of that district. VACNORCAL then sued the city for alleged violations of the Brown Act, arguing the resolution was the result of an illegal serial communication and that the city council had a pattern and practice of violating the Brown Act. The trial court dismissed the case. The appeals court found VACNORCAL's suit was based on a factual dispute. The court noted that "VACNORCAL has not shown as a matter of law that a total of six City Council members—a majority—developed a collective concurrence approving the Vietnamese business district project in violation of [the Brown Act]." As to the pattern and practice claim, the court pointed out that "there is no justiciable controversy in this case that can be disposed of as a matter of law because the actual present controversy is a factual dispute regarding the communications between City Council members about [past] projects." Although the court found VACNORCAL could not prove its case, it observed that the trial court had erred in dismissing the case based on its failure to state a claim. (*Vietnamese-American Community of Northern California v. City of San Jose*, No. H037748, California Court of Appeal, Sixth District, Aug. 26)

Missouri

A court of appeals has ruled that the federal Copyright Act bars the disclosure of course syllabi for professors at the University of Missouri. The National Council of Teachers Quality requested a variety of information from the University, including course syllabi. The University denied access to the course syllabi, claiming they were copyrighted and that their disclosure was thus barred under the Sunshine Law. The appeals court agreed, noting that "the test for determining whether the 'protected from disclosure by law' exemption applies is not whether the subject law explicitly deals with disclosure. Rather, the proper inquiry is whether disclosing records pursuant to the Sunshine Law would violate the subject law." The court pointed out that "in order to disclose the syllabi as requested by the NCTQ, the University would have to reproduce and distribute the syllabi. Thus, while the Federal Copyright Act does not explicitly protect against disclosure, it does protect against the means by which the requested disclosure would be obtained. Disclosing the syllabi to the NCCTO—through reproduction and distribution—would constitute a violation of the Federal Copyright Act. Therefore, the syllabi *as requested* are 'protected from disclosure by [the Federal Copyright Act].'" But the court explained that "NCTQ's request *for access* to the syllabi is not protected from disclosure by the federal copyright statutes, which address only reproduction and copying. Thus, the subject records should not be deemed closed. However, the University could properly deny the NCTQ's sole request to copy the documents." The court rejected NCTQ's fair use argument, finding it was not applicable in the context of an open records request. NCTQ also argued the University did not have standing to assert the teachers' copyright. But the court observed that "here, the University decided that the exclusive rights of faculty authors to authorize reproduction and distribution meant that the syllabi were 'protected from disclosure by law' within the meaning of [the Sunshine Law]. Thus, the University contends that it was 'simply making the determination required by the Sunshine Law.'" (*National Council of Teachers Quality, Inc. v. Curators of the University of Missouri*, No. WD 76785, Missouri Court of Appeals, Western District, Aug. 26)

New Jersey

A court of appeals has ruled that Uniform Crime Reporting data for the Township of Jackson is not subject to disclosure under the Open Public Records Act because it becomes part of an annual compilation of crime data submitted and analyzed by the Attorney General before being made public. Raymond Cattonar, a Jackson Township resident serving on the mayor's fiscal responsibility board, questioned the size of the police department's annual budget. He requested data from the township. He received some, but the township clerk told him statistical crime data was not publicly available until reviewed annually by the Attorney General.

Cattonar appealed to the Government Records Council, which ruled in favor of the township. The appeals court agreed that the requirement that the data be submitted and reviewed by the Attorney General prohibited its disclosure by individual municipalities. The court noted that "when viewed cohesively, the Legislature created the UCR provisions and designated direction, control and supervision of the system to the Attorney General. . .[A] key component to the system is uniformity. Thus, the Attorney General must assure the categories of information publicly reported in the annual report consistently represent equivalent events. This requisite reveals the need for the Attorney General to 'have such data collated and formulated' to 'compile such statistics as he may deem necessary in order to present a proper classification and analysis of the volume and nature of crime and the administration of criminal justice with this State.' As a practical matter, these efforts must precede public disclosure." The court observed that "we do not view the exclusion of the new data as defeating the provisions of public access. Rather, its design is to allow a central agency, here the State Police on behalf of the Attorney General, the ability to gather, verify, and coordinate the required information." (*Raymond Cattonar v. Township of Jackson Police Department*, No. A-2419-12T4, New Jersey Superior Court, Appellate Division, Aug. 29)

Ohio

The Supreme Court has ruled that records pertaining to threats received against the governor qualify as security records exempt from the Ohio Public Records Act. Joseph Mismas, editor of Plunderbund Media, requested the number of investigations regarding threats to the governor, a copy of the final investigation report, and whether the threat was considered credible or resulted in charges. In response, the Highway Patrol denied the request, indicating the records were security records. Plunderbund argued that because the security records exemption protected a "public office," it applied only to such things as the placement of cameras, blueprints of buildings, or scheduling of security personnel. But the court pointed out that "a public office cannot function without the employees and agents who work in that office, and records 'directly used for protecting or maintaining the security of a public office' must inevitably include those that are directly used for protecting and maintaining the security of the employees and other officers of that office." The court indicated that a reasonable reading of the exemption was that "records that contain information directly used to protect and maintain the security of the governor will also be directly used to protect and maintain the security of the office of the governor." Finding the government had provided sufficient justification for invoking the exemption, the court noted that "the department and other agencies of state government cannot simply label a criminal or safety records a 'security record' and preclude it from release under the public records law, without showing that it falls within the [exemption's] definition." (*State ex rel. Plunderbund Media, LLC v. John Born, Director of Public Safety*, No. 2013-0596, Ohio Supreme Court, Aug. 27)

Pennsylvania

In a case involving a two-year delay by the Chambersburg Area School District in disclosing thousands of responsive documents concerning an after-school program called the "Hip Hop Club" to Maria Dorsey, a court of appeals has ruled that the District properly asserted the attorney-client privilege to withhold 19 pages of emails. After receiving the District's initial response pertaining to the emails, Dorsey filed a complaint with the trial court and the Office of Open Records. Under the Right to Know Law, trial-level courts have jurisdiction over denials from municipal agencies while OOR has initial jurisdiction over state agencies. Because the District had not defended its invocation of attorney-client privilege before the OOR, that office found the privilege did not apply. The District then turned to the trial court, which ruled that the 19 emails were protected. Dorsey then appealed to the court of appeals. After the trial court admitted to the appeals court that it had not explained its reasons on the record for reaching its decision, the appeals court remanded the case back to the trial court. At that time, the District found 3, 591 pages responsive to Dorsey's

request that had been discovered as a result of a civil suit filed by another individual pertaining to the Hip Hop Club. The District disclosed those records to Dorsey and told the court that its failure to produce the records earlier was unintentional. The appeals court agreed with the trial court that the 19 emails were privileged. However, the appeals court found the trial court had erred in not hearing Dorsey's claim that the District's two-year delay showed bad faith. The appeals court noted that "the additional documents were provided shortly before the trial court issued its determination in this matter and not as a result of complying with any duties of disclosure under the RTKL, but as a result of compliance with discovery requests in civil litigation. There is no indication why, with diligence, the District would not have been able to produce those documents in response to the RTKL requests the way they were able to in compliance with the discovery requests. Under these circumstances, the trial court should not have granted District's Motion to Quash and, instead, should have determined whether the District made a good faith effort in responding to the RTKL requests and, if not, whether Requester was entitled to penalties and costs. . ." (*Chambersburg Area School District v. Maria Dorsey*, No. 1358 C.D. 2013, Pennsylvania Commonwealth Court, Aug. 20)

South Carolina

The Supreme Court has ruled that the Department of Revenue violated the time limit for responding to a request when it told Edward Sloan in response to his request for the award of a contract to a computer security company in response to a cyber-attack on DOR databases that "if we are unable to locate, obtain or release the requested file(s) you will be notified of the decision and the reasons for it." Unsatisfied with the response, Sloan filed suit. The court noted that the agency's response "seeks to delay DOR's final determination as to the public availability of the requested documents. DOR's response is best characterized as 'we will get to it when we get to it,' which is manifestly at odds with the clarity mandated by the [determination section of the FOIA]." Three weeks after Sloan filed suit, DOR disclosed the records and the trial court dismissed his suit as moot. The Supreme Court agreed that Sloan's request for declaratory judgment was now moot, but found that his request for attorney's fees was not. The court noted that "Sloan is the prevailing party. As the prevailing party under the circumstances, the trial court erred in not awarding Sloan his reasonable attorney's fees and costs. Sloan is entitled to recover his reasonable fees and costs in this action." One justice dissented, pointing out that because an award of attorney's fees was discretionary Sloan should be awarded fees only if the trial court determined his entitlement on remand. (*Edward D. Sloan, Jr. v. South Carolina Department of Revenue*, No. 27437, South Carolina Supreme Court, Aug. 20)

The Federal Courts…

The Second Circuit has ruled that photographs and videos depicting Guantanamo Bay detainee Mohammed al-Qahtani, belived to be the so-called "20th hijacker, are protected by **Exemption 1 (national security)** because of their potential propaganda value in inciting violence against U.S. interests. After a log of his interrogations was leaked and published in Time Magazine, the government officially confirmed the dates and conditions of al-Qahtani's detention; the role of the Defense Department and the FBI in his interrogation; the interrogation tactics used; al-Qahtani's medical, physical, and psychological response to interrogation; and his eventual cooperation. In a 2009 interview published in the *Washington Post*, the DoD's Convening Authority for Military Commissions, Susan Crawford, stated that in her opinion, al-Qahtani's Guantanamo treatment "met the legal definition of torture." Based on these various official disclosures, the Center for Constitutional Rights in 2010 requested photographs and videos of al-Qahtani. The Defense Department denied the request, asserting that all the records were properly classified under Exemption 1. The trial court agreed and the Second Circuit has affirmed its decision. The government's case for showing harm to national security was based on the declaration of Major Gen. Karl Horst, who served as Chief of Staff of the U.S.

Central Command. His declaration argued that "release of any portion of the records would facilitate the enemy's ability to conduct information operations and could be used to increase anti-American sentiment." CCR urged the court to reject the "propaganda" justification, warning that "this justification would, perversely, be most forceful where the information was most controversial and, accordingly, of greatest interest to the public." CCR pointed to the breadth of Horst's claim, noting that it "suggests that release of *any* depiction of *any* detainee would endanger national security." CCR argued that the government's prior disclosures regarding al-Qahtani undermined its justification for withholding the photos. But the court noted that "on the contrary, we conclude that, inasmuch as these disclosures have heightened al-Qahtani's prominence, here and abroad, they increase the likelihood that official release of images of al-Qahtani—even images that do not depict abuse or mistreatment—could be exploited by extremist groups as tools to recruit or incite violence." The court added that "we find, moreover, that *images* of al-Qahtani, alone and interacting with military personnel, particularly when released directly by the FBI and DoD, may prove more effective as propaganda than previously released written records that disclose the same—or even more controversial—information about al-Qahtani's detention." The court, however, emphasized the limits of its decision, noting that "we do not now hold that every image of a specifically identifiable detainee is exempt from disclosure pursuant to FOIA, nor do we hold that the government is entitled to withhold any documents that may reasonably incite anti-American sentiment." (*Center for Constitutional Rights v. Central Intelligence Agency, et. al*, No. 13-3684, U.S. Court of Appeals for the Second Circuit, Sept. 2)

Judge Ketanji Brown Jackson has ruled that the U.S. Fish and Wildlife Service has shown that its attorney-client privilege claims are appropriate under **Exemption 5 (privileges)**, but that it has so far failed to sufficiently justify its invocation of the deliberative process privilege and the attorney work-product privilege. The case involved the third time the Conservation Force had sued the agency to challenge its denial of permits under the Endangered Species Act to import hunting trophies of Canadian wood bison. After the agency failed to rule on permit applications submitted by Conservation Force, the organization sued. The agency then denied the application and the organization sued again, claiming the agency's action was arbitrary and capricious under the APA. This second suit resulted in a partial victory by Conservation Force when Judge John Bates found the agency had failed to articulate a satisfactory reason for denying the permits despite overwhelming scientific evidence supporting the grant of a permit. Instead, the evidence suggested the denial was not based on policy grounds but on the influence of a government attorney-advisor who strongly disagreed with granting the permit. This suggestion led to Conservation Force's third suit to challenge the agency's denial of various records pertaining to the wood bison decision that the agency considered privileged. First rejecting the agency's deliberative process privilege claims, Jackson explained that the agency had apparently placed too much emphasis on whether documents were referred to as drafts. Instead, she noted that "notwithstanding its status as a 'draft,' a document that does not reflect the genuine evolution of an agency's decisionmaking process and instead merely recites 'factual information which does not bear on policy information,' is not entitled to protection under the deliberative process privilege." She pointed out that "Defendants have provided little if any information regarding the *role* of the document's author with respect to the agency's decisionmaking process, or that of the recipient of the document, or how, if at all, the document impacted the agency's deliberations. A document's context is the *sine qua non* of the court's assessment of whether or not the document is predecisional and deliberative." But Jackson found the agency had adequately supported its attorney-client privilege claims. She observed that "Defendants have ably demonstrated that (1) the listed documents were communications between agency employees and agency counsel, (2) the communications pertained to legal advice or litigation, and (3) the content of the communications was kept confidential, which is all that proper invocation of the attorney-client privilege in the context of FOIA Exemption 5 requires." Conservation Force argued the claims fell within the crime-fraud exception because of the agency's alleged failure to explain in the previous litigation the basis for its decision. But Jackson noted

ACCESS REPORTS

this was not the point of FOIA. Instead, she indicated that "it is also clear that the statutorily-prescribed remedy for the underlying problem of improper agency decision making—including the improper decision to allow politics to overshadow scientific evidence—is judicial review and a remand to the agency for a more appropriately-reasoned decision, *not* criminal charges, fines, or penalties." She then rejected the agency's attorney work-product claim, pointing out that "the fact that Defendants were engaged in litigation regarding the wood bison permits at the heart of this FOIA request—it is entirely conceivable that the work product-related documents have been appropriately withheld, but Defendants' failure to identify with specificity whether or not each document was prepared for the purpose of litigation in the index itself, or to explain whether the redactions pertain to legal strategy and not merely factual matters that would have been presented to an adversary, makes it impossible for the Court to reach the conclusion that Exemption 5 was properly invoked." (*Conservation Force v. Sally Jewell*, Civil Action No. 12-1665 (KBJ), U.S. District Court for the District of Columbia, Sept. 2)

Judge Beryl Howell has ruled that Pfizer and Perdue Pharma have shown that most records submitted to the Office of the Inspector General at the Department of Health and Human Services in compliance with Corporate Integrity Agreements arising from the companies' illegal off-label promotion of drugs are protected by **Exemption 4 (confidential business information)**. In her earlier ruling, Howell had largely rejected Public Citizen's argument that the CIA records were not "commercial" because they concerned illegal activity on the part of the companies. While Howell had found earlier that the records were clearly "commercial," she had concerns about whether the two companies had adequately shown that disclosure could pose substantial competitive harm. This time, she found the records were clearly "confidential" and qualified for protection under Exemption 4. Describing the commercial nature of the documents, Howell noted that "both declarants state that the documents in question contain information about interactions between the companies' salespeople and customers, how the companies promote their products, and the way the companies implement their compliance programs." Howell explained that Public Citizen continued to make the argument that records that might reveal illegal activities could not be considered confidential. She observed instead that "even if the activities described in such records pertain to what may be deemed illegal conduct, the context of and facts about the activity revealed in the records may retain their commercial character, in terms of revealing closely held information about the companies' operations and structure that would be valuable to competitors." She pointed out that this was particularly true in a highly-regulated industry such as pharmaceuticals. She noted that the disputed records "are, in a sense, a free roadmap as to what works in pharmaceutical marketing without violating the legal framework of regulatory enforcement and laws that govern the industry, and what activities to avoid, and release of this roadmap would allow competitors to avoid incurring the experiential or monitoring costs Pfizer and Purdue did in gaining the information." She pointed out that "plaintiff is unable to overcome the substantial competitive advantage to be gained by the defendant-intervenors' competitors to be able to learn from Pfizer and Purdue's mistakes at little or no cost in capital or exposure to risk." Another category concerned detailing sessions, or verbatims, records that captured health care providers' recollections of conversations with salespeople. Howell found such records could provide critical competitive insights into the companies' operations. She noted that "a competitor wishing to obtain this information would, absent its release through the FOIA, have to pay a market research firm to conduct a similar survey, incurring the same expenses Pfizer incurred in the first instance. A competitor's ability to obtain the information at virtually no cost would cause competitive harm to Pfizer, since it could be used affirmatively by those competitors to challenge Pfizer's place in the market and exploit any vulnerability revealed through the verbatims' content." One category involved the way in which the companies identified individuals ineligible to participate in federal programs because of illegal behavior. Howell indicated that "there is, therefore, little doubt that a competitor could make use of the information to be gleaned about the defendant-intervenors' compliance programs from the reports of actions taken in response to the discovery of an Ineligible Person as well as the information to be gleaned about the companies' business

practices and corporate structures." (*Public Citizen v. United States Department of Health and Human Services*, Civil Action No. 11-1681 (BAH), U.S. District Court for the District of Columbia, Sept. 5)

After her original ruling against CREW on the issue of what constituted a determination of a request for purposes of exhausting administrative remedies was soundly overturned by the D.C. Circuit, Judge Colleen Kollar-Kotelly has awarded CREW $153,000 in **attorney's fees** for its work litigating the case, including an additional $20,000 for the costs of responding to the FEC's objections to the report and recommendation prepared by Magistrate Judge John Facciola. Relying on the D.C. Circuit's decision, Facciola had found CREW had substantially prevailed and was eligible for an award. Agreeing with Facciola, Kollar-Kotelly noted that in its decision 'the D.C. Circuit provided guidance as to what type of response from an agency constitutes a determination that must be communicated to a FOIA requester in the future in order to trigger the requirement that a FOIA requester must exhaust administrative remedies before he or she may proceed to district court. . .The Court agrees with the reasoning in the Request and Recommendation that CREW substantially prevailed by virtue of the favorable D.C. Circuit opinion. . ." Because the FEC had conceded that the disclosure of the records was in the public interest and that CREW had neither a commercial or personal interest in the records, Kollar-Kotelly focused solely on the reasonableness of the agency's position. The FEC argued that it properly relied on Kollar-Kotelly's ruling that CREW was required to file an administrative appeal as the basis for not producing additional documents at an earlier time. She agreed with Facciola's explanation that "win, lose, or draw, the FEC would have had to produce the documents eventually: had it won on appeal, CREW would have needed only to exhaust whatever administrative remedy the FEC imposed before the FEC would have to turn over the documents." Kollar-Kotelly noted that "reliance on this Court's ruling on a procedural issue was not a reasonable basis for failing to produce documents that the FEC, by its own admission, was still required to produce by law." The agency also contended that its failure to provide more documents until 2013 was the result of its understanding of the parameters of a narrowed search agreed to by CREW. But Kollar-Kotelly pointed out that "the FEC did not act reasonably in withholding documents for two years identified in CREW's opposition as documents that 'the agency had failed to produce' in its first batch of documents responsive to the narrowed search, and to which the FEC itself has asserted it had no legal basis to withhold." Having concluded CREW was entitled to fees, Kollar-Kotelly next addressed the agency's complaints about the size of the award. The agency's primary argument was that because CREW's timesheets had been found wanting in two other district court cases the same problems were likely present in this case. Relying on *Role Models America v. Brownlee*, 353 F.3d 962 (D.C. Cir. 2004), the FEC argued that CREW's timesheets were likely inflated. But Kollar-Kotelly explained that *Role Models* and related cases "stand for the proposition that the court must determine whether the fee request appears reasonable on its face based on the type of work that was required. . .Here, Judge Facciola properly found that CREW's request for $139,998.68 in attorney's fees in a 'case [that] presented novel legal issues that required substantial analysis and advocacy' was not objectively unreasonable. . .[T]he holding in *Role Models* is distinguishable from the instant matter where the requested fees do not appear unreasonable on their face based on the fact that the instant matter required significant legal research and briefing for the appeal of a novel legal issue." Kollar-Kotelly then went on to award CREW $20,000 for its response to the agency's objections. But she rejected CREW's attempt to use the CPI *Laffey* Matrix to calculate those rates, noting that "the parties have already conceded that the USAO *Laffey* Matrix [which used a less precise calculation] is applicable in this matter." (*Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, Civil Action No. 11-951 (CKK), U.S. District Court for the District of Columbia, Sept. 5)

Judge Rosemary Collyer has ruled that the Competitive Enterprise Institute does not have a remedy under the **Federal Records Act** to challenge the EPA's allegedly improper destruction of text messages, although CEI has made out a sufficient cause of action under the **Administrative Procedure Act** to survive the agency's motion to dismiss. CEI claimed that evidence showed that both former EPA Administrator Lisa

ACCESS REPORTS

Jackson and current Administrator Gina McCarthy routinely used text messaging as a means of substantive communication and that their phone bills indicated in excess of 5,000 text messages, yet the agency repeatedly told CEI that it had no records. CEI filed suit, claiming the agency's policy of routinely deleting text messages violated the FRA, the APA, and FOIA. Relying on the Supreme Court's ruling in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), Collyer noted that "[the] precedent is clear that private litigants cannot state a claim for legal relief under FRA." As a result, she pointed out that "CEI cannot state a claim under FRA for an agency's records destruction decisions or its compliance with FRA's enforcement scheme." Collyer dismissed CEI's claim under the APA that the agency was violating its records-retention policy, indicating that "given the circumscribed nature of judicial review under FRA, private plaintiffs cannot rely on the APA to challenge what they are expressly prohibited from challenging under the FRA, *i.e.*, an agency's substantive decisions to destroy or retain records." But Collyer found that *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), in which the D.C. Circuit ruled that a plaintiff did have a cause of action under the APA to challenge an agency's failure to enforce its obligations under the FRA, provided CEI the basis for challenging the agency's action on that issue. She observed that "CEI adequately alleges that EPA 'fail[ed] to take action in compliance with the [FRA],' and seeks to compel the Agency to comply with its statutory mandate [to notify the Archivist of a violation of FRA]. EPA responds that not all text messages necessarily constitute federal records, and therefore CEI has failed to state a claim for failure to notify the Archivist. But it is implausible that EPA Administrators would not have suspected the destruction of *any* federal records with the removal of over 5,000 Agency text messages." Collyer dismissed CEI's FOIA claim, pointing out that "because FOIA only addresses an agency's *disclosure* requirements and not its *record-keeping* obligations, CEI cannot state a claim for unlawful destruction of records under FOIA." (*Competitive Enterprise Institute v. U.S. Environmental Protection Agency*, Civil Action No. 13-1532 (RMC), U.S. District Court for the District of Columbia, Sept. 4)

Judge Barbara Rothstein has ruled that the FBI properly invoked **Exemption 1 (national security)**, **Exemption 3 (other statutes)** and **Exemption 7 (law enforcement records)** as well as an **exclusion** to withhold records from Jeffrey Labow concerning vandalism of the Four Seasons Hotel as part of a 2008 protest of a meeting by the International Monetary Fund in Washington. Because Labow requested records pertaining to himself, the agency initially failed to locate any records. Labow then filed suit and the agency found 159 records and disclosed 60 in full or in part. Labow argued that innocuous information provided by foreign governments did not qualify for classification. But Rothstein observed that "the D.C. Circuit, however, has not interpreted 'foreign relations or foreign activities' so narrowly. Rather, so long as 'unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to national security. . .,' then the information is appropriately classified under Executive Order 13526." Rothstein found that "given the government's explanation of the harms that could result from revelation of the information that Labow seeks, the government has amply justified its application of Exemption 1. . ." Rothstein approved the agency's use of the National Security Act, the wiretap statute, and grand jury secrecy to withhold information under Exemption 3. Rejecting Labow's assertion that the agency had failed to show that disclosure of records would reveal matters considered by a grand jury, Rothstein pointed out that "this information, however—such as the identities of those subpoenaed, identities and descriptions of requested records, and records produced in response to subpoenas—clearly all fall within Rule 6(e) because it would 'tend to reveal. . .the strategy or direction of the investigation' and is not merely 'information coincidentally before the grand jury.'" Although she expressed concerns about the agency's description of the category of records it was withholding under **Exemption 7(A) (interference with ongoing investigation or proceeding)**, she indicated that "the functional category of information could be construed as information regarding [a] pending investigation. The government then sufficiently explains how the release of such information could adversely impact the prospective case." Labow argued that **Exemption 7(D) (confidential sources)** did not apply because the sources were likely either undercover police or individuals who had been coerced by threat of prosecution. Rothstein noted that "Labow fails to provide case law supporting his assertion that if the source was in fact

coerced, that has bearing on Exemption 7(D)'s applicability." She rejected Labow's argument that **Exemption 7(E) (investigative methods and techniques)** did not apply because the withheld information was either already public or could not possibly help someone evade the law. Rothstein pointed out that "because the government not only attests that these are investigative techniques and procedures but also that these withheld portions relate to specific details that are generally unknown to the public, it is unnecessary to resolve whether, categorically, investigative techniques and procedures that are generally known to the public are protected under Exemption 7(E). Labow's related argument that disclosure of techniques that 'could not possibly help criminals evade the law' is contrary to the statutory text as that prong is not required to withhold information that would reveal law enforcement techniques or procedures." The agency had provided the court with a declaration pertaining to whether an exclusion had been used. Rothstein concluded that "if an exclusion was in fact employed, it was, and continues to remain, amply justified." (*Jeffrey Labow v. U.S. Department of Justice*, Civil Action No. 11-1256 (BJR), U.S. District Court for the District of Columbia, Sept. 4)

A federal court in California has ruled that by misinterpreting Jeannette K. Burmeister's requests for records concerning the decision by the Department of Health and Human Services to provide a task order to the National Institute of Medicine to study chronic fatigue syndrome the agency failed to conduct an **adequate search**. Burmeister requested any contracts as well as records pertaining to the agency's decision to issue a task order rather than to open the study to competitive bidding. But the agency chose to interpret her request more narrowly, contending it did not address how the contracting mechanism was chosen or how the Institute of Medicine was chosen. The court observed that "this is obviously an unreasonably narrow interpretation of Burmeister's request given the language she used." The court added that "indeed, [the agency] explains in [its] supplemental declaration that a broader search (the one the government should have conducted given the actual language of Burmeister's request) 'is a completely different type of search and presumably would have resulted in a much larger production.'" The government argued the case was moot and that Burmeister's only remedy was to explain why she thought the agency's response was deficient. The court, however, pointed out that "the case law says exactly the opposite of what counsel for the government represented at the hearing." Although Burmeister asked to conduct discovery, the court indicated that was unnecessary since the agency was required to conduct a new search and provide any non-exempt responsive records. The court observed that "the government may not artificially narrow this request to exclude 'background' records, such as records relating to the decisionmaking process about whether and how to engage the Institute of Medicine for this endeavor." (*Jeannette K. Burmeister v. United States Department of Health and Human Services*, Civil Action No. 14-00133-VC, U.S. District Court for the Northern District of California, Sept. 2)

A federal court in Colorado has ruled that the Western Energy Alliance is not entitled to **attorney's fees** for its suit against the U.S. Fish and Wildlife Service for records pertaining to the peer review of the Greater Sage-Grouse Conservation Objectives Final Report. WEA filed suit after the agency failed to respond to its request. Although the agency disclosed the records after litigation commenced, WEA pursued its request for attorney's fees. Assessing the public interest in disclosure, the court noted that "WEA, in its motion, asserts that the information was shared 'with its members and other stakeholder groups,' and 'referenced' in lobbying activities. WEA, in its reply, also suggests that its use of the material has been somewhat successful in attracting the attention of policy makers. Although WEA nakedly alleges that its use of the material will benefit the public, there is no demonstration that the documents were disseminated for the benefit of the 'public' as opposed to the benefit of only WEA's dues-paying members. . .Even assuming that the limited materials that WEA obtained would be of substantial public interest—it appears the final version of the report was already public—WEA has used the material exclusively for the benefit of its members and failed to disseminate it to the public." Because the materials had only benefited WEA's members, the court indicated that its self-interest motive was sufficient to encourage it to pursue litigation. But the court found the agency's explanation for the delay—that the request had been misplaced and the agency was short-staffed—was not

ACCESS REPORTS

convincing. The court pointed out that "it is difficult to divine a 'reasonable basis in law' that could support the government's delay." However, the court observed that "because three of the four factors weigh against an award, and FWS cooperated in resolving the matter quickly after litigation commenced, the Court finds that an award of attorney fees is not justified in this case." (*Western Energy Alliance v. U.S. Fish and Wildlife Service*, Civil Action No. 13-02811-MSK, U.S. District Court for the District of Colorado, Sept. 2)

A federal court in Colorado has ruled that the CIA properly withheld pictures of the deceased Osama bin Laden under **Exemption 1 (national security)** because they were properly classified. Kevin Evans had requested the photos and his suit was stayed until similar litigation in the D.C. Circuit brought by Judicial Watch was resolved. After the D.C. Circuit ruled in favor of the government, Evans' litigation was allowed to proceed. Instead of trying to argue the D.C. Circuit's decision in the Judicial Watch case was incorrect, Evans instead relied on a public comment made by then CIA Director Leon Panetta shortly after bin Laden's death that, in his judgment, some photographic evidence of bin Laden's death would probably ultimately be made public. Rejecting Evans' argument, the court pointed out that "the CIA need only show that the photographs were properly classified—that is, that the procedural requirements for classification were met and that disclosure of the records could reasonably be expected to cause grave damage to national security. Mr. Panetta's comments do not bear on those questions. Obviously, Mr. Panetta's remarks do not address the procedural classification of the documents. . .Rather, it is obvious that Mr. Panetta was making a prediction about what was likely to happen given the public and political pressure he anticipated would surround the question. That prediction is entirely irrelevant to the question of whether the CIA's subsequent invocation of Exemption 1 to deny Mr. Evans' FOIA request was proper." (*Kevin D. Evans v. Central Intelligence Agency*, Civil Action No. 11-02544-MSK-KLM, U.S. District Court for the District of Colorado, Sept. 2)

Judge James Boasberg has ruled that the FAA failed to show it conducted an **adequate search** for records pertaining to a broad-ranging request from David Elkins and that it had adequately explained its invocation of **Exemption 7(E) (investigative methods and techniques)** for certain redactions. Although Boasberg characterized Elkins's request as potential "tinfoil-hat material," he discerned that Elkins was asking the FAA for information about an aircraft that Elkins apparently thought had been conducting surveillance of his home in St. Petersburg. The agency searched the Tampa Airport Traffic Control Tower for records and withheld certain information under 7(E). Turning to the search, Boasberg indicated that "the Court is left with distinct uncertainty as to whether the agency appreciated the whole of Plaintiff's FOIA request. [The agency's] declaration refers only to 'various records' sought by Plaintiff, without further elaboration. And the FAA's Reply indicates that the agency understood Plaintiff's request as limited in scope to records likely to be housed at an airport traffic-control tower." Boasberg explained that "Plaintiff's request, however, also itemized records likely to be housed elsewhere," such as records pertaining to FAA agreements with the Department of Justice. "Common sense dictates that some of these records, should they exist, are unlikely to be located at an aircraft-control tower." Boasberg found the agency's exemption claims also fell "substantially short of meeting its obligations." He noted that "its briefing is replete with vague and conflicting references to redacted material" and observed that "as plaintiff points out, the FAA failed to provide a *Vaughn* Index or anything comparable that explains with reasonable specificity which records were released, which records were withheld, and what material was redacted." He concluded that "in light of the FAA's failure to provide the requisite level of clarity and detail, summary judgment on its withholdings under Exemption 7(E) is unwarranted at this juncture, as is any determination on the propriety of the agency's segregability determination." (*David J. Elkins v. Federal Aviation Administration*, Civil Action No. 14-476 (JEB), U.S. District Court for the District of Columbia, Aug. 28)

A federal magistrate judge in Florida has ruled that the FBI properly withheld records from Nicolas Jeanty concerning himself under a variety of exemptions. Addressing third-party personal information withheld under **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, the magistrate

judge noted that "the plaintiff has not proffered any reasons or provided any evidence to suggest that the withheld documents carry a significant public interest and that disclosure of those documents would serve that interest. The plaintiff simply alleges that the information contained in the withheld documents would help him in proving that federal and governmental agents engaged in fraud leading to the prosecution of the plaintiff. Accordingly, only the plaintiff's interest is at stake and there is no public interest that would justify the disclosure of this information." The magistrate judge approved the agency's withholding of records on the execution of arrest warrants under **Exemption 7(E) (investigatory methods or techniques).** The magistrate observed that "the execution of specific arrest warrants is essential for the apprehension of criminals. If criminal targets have knowledge of such techniques, it is likely they will use it to circumvent and undermine law enforcement." The magistrate judge indicated the FBI had not yet shown that a sealing order in another case prohibited disclosure of records. The magistrate judge pointed out that the agency's affidavit "merely states that the aforementioned documents were withheld pursuant to an order placing it under seal. Thus, the defendants have failed to meet their burden of showing that the order placing these documents under seal was the functional equivalent of an injunction prohibiting disclosure." Because the agency had not even bothered to review the disputed documents, the magistrate judge allowed the agency to file a supplemental affidavit. (*Nicolas Francois Jeanty, Jr. v. Federal Bureau of Investigation*, Civil Action No. 24-30776, U.S. District Court for the Southern District of Florida, Aug. 25)

■ ■ ■

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.