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Washington Focus: The Center for Medicare & Medicaid Services announced Jan. 14 that it may start disclosing physician reimbursement data in response to FOIA requests following the recent dissolution of a 35-year-old injunction prohibiting the disclosure of such data as it pertains to Florida physicians because it violated their Privacy Act rights. After reviewing the court decision dissolving the injunction, HHS Secretary Kathleen Sebelius apparently decided the disclosure of such data under FOIA should be made on a case-by-case basis. In its announcement, CMS indicated that "as the outcome of the balancing test will depend on the circumstances, the outcome of these analyses may vary depending on the facts of each case." Although the Florida injunction is now dissolved, the 2009 D.C. Circuit ruling in Consumers Checkbook v. Dept of Health and Human Services, found a privacy right for individual physicians in such data that probably provides sufficient legal support for continuing to withhold physician reimbursement data.

Public Reference to Opinion Does Not Waive Privilege

The D.C Circuit has ruled that a 2010 legal opinion prepared by the Justice Department's Office of Legal Counsel for the FBI concluding that the Electronic Communications Privacy Act did not prohibit service providers from disclosing call detail records to the FBI on a voluntary basis without legal process is protected by Exemption 5 (deliberative process privilege) because the FBI never adopted the opinion. Writing for the court, Senior Circuit Court Judge Harry Edwards explained that "the OLC Opinion amounts to advice offered by OLC for consideration by officials of the FBI. Such a memorandum is not the law of the agency unless the agency adopts it."

Under the 2005 reauthorization of the Patriot Act, the Justice Department's Office of Inspector General was directed to audit the use and effectiveness of national security letters used by the FBI. The OIG found the agency had issued national security letters without appropriate authorization. The

OIG conducted a second investigation and gave the FBI a draft of the report. Valerie Caproni, General Counsel of the FBI, then sought legal advice from OLC concerning the legality of its use of national security letters. The OIG report, which was publicly disclosed, indicated the FBI had asked OLC for an opinion and that OLC had agreed that the FBI was allowed to obtain these records on a voluntary basis under certain circumstances. The OIG report concluded that the policy "creates a significant gap in FBI accountability and oversight that should be examined closely by the FBI, the Department [of Justice], and Congress." The OIG report also observed that the FBI had stated that it did not intend to use the authority. At a hearing held by the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties concerning the OIG report, Caproni referred to the findings of the OLC opinion in testimony, but told the subcommittee she could say nothing more about the opinion in public because it was classified.

EFF requested a copy of the OLC opinion, which was withheld entirely by DOJ, citing both Exemption 5 (deliberative process privilege) and Exemption 1 (national security). The district court upheld the government's exemption claims and indicated as well that "no portion of the OLC Opinion is reasonably segregable and releasable" because "the entirety of the OLC Opinion was withheld under Exemption 5, leaving nothing significant that could be disclosed in redacted format."

Edwards noted that the Supreme Court, in *NLRB v. Sears Roebuck*, 421 U.S. 132 (1975) ruled that "under FOIA, agencies must disclosure their 'working law,' i.e., the 'reasons which [supplied] the basis for an agency policy actually adopted." He pointed out that the D.C. Circuit had applied this principle in a number of cases, most recently in *Public Citizen v. OMB*, 598 F.3d 865 (D.C. Cir. 2010), where the court concluded that the deliberative process privilege did not apply to "memoranda describing which agencies were permitted, by statute or by prior OMB practice, to submit their budgetary materials to Congress without first clearing them with OMB" because they "determine OMB's interaction with outsiders" and had "real-world effects on the behavior of. . .agencies." But, Edwards pointed out, those cases were inapplicable to the OLC opinion "because OLC did not have the authority to establish the 'working law' of the FBI." He indicated that "because OLC cannot speak authoritatively on the FBI's policy, the OLC Opinion differs from memoranda we have found to constitute the 'working law' of an agency." He explained that "OLC is not authorized to make decisions about the FBI's investigatory policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy." While EFF argued that agencies typically followed OLC advice, Edwards observed that "that the OLC Opinion bears these indicia of a binding decision does not overcome the fact that OLC does not speak with authority on the FBI's policy; therefore, the OLC Opinion could not be the 'working law' of the FBI unless the FBI 'adopted' what OLC offered." He added that "even if the OLC Opinion describes the legal parameters of what the FBI is *permitted* to do, it does not state or determine the FBI's policy. The FBI was free to decline to adopt the investigative tactics deemed legally permissible in the OLC Opinion. Indeed, the OIG's report acknowledged that the FBI had 'declined, for the time being, to rely on the authority discussed in the OLC Opinion.'"

In *Sears*, the Supreme Court indicated that a document would lose its privileged status if it was expressly adopted by the agency. EFF argued the FBI had adopted the OLC Opinion by publicly referring to it in the OIG report and during congressional testimony. To support its argument, EFF relied on *National Council of La Raza v. Dept of Justice*, 411 F.3d 350 (2d Cir. 2005) and *Brennan Center for Justice v. Dept of Justice*, 697 F.3d 184 (2d Cir. 2012). But Edwards found both cases inapplicable because they concerned public acceptance of policy changes by the agency itself. He noted that "this case differs from the cases cited by EFF because the public references to the OLC Opinion did not come from the FBI itself. Rather, the public references originated from the OIG and Congress. . .[T]he FBI never *itself* publicly invoked or relied upon the contents of the OLC Opinion. . .The OIG's references to the OLC Opinion do not establish that *the FBI* adopted the OLC Opinion as *its own* reasoning. Nor does Caproni's response to inquiries from members of Congress establish that the FBI adopted the OLC Opinion's reasoning as *its own*." He observed that "far from

publicly using the OLC Opinion to justify the FBI's position, Caproni's testimony indicates that the OLC Opinion *did not* determine the FBI's actions or policy."

EFF challenged the district court's conclusion that the agency had conducted a reasonable segregability review and found that nothing could be disclosed. EFF argued that the agency was required to disclose any non-privileged factual information. Noting that "because context matters, the proposition advanced by EFF is not inviolate," Edwards agreed with the agency and the district court that the opinion contained no non-privileged information. (*Electronic Frontier Foundation v. United States Department of Justice*, No. 12-5363, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 3)

Views from the States…

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

District of Columbia

The court of appeals has ruled that the trial court erred when it accepted the District of Columbia's invocation of the exemption protecting records related to an ongoing investigation to withhold all records concerning an internal investigation of the accuracy of the District's breathalyzer test. The Fraternal Order of Police requested records concerning the investigation, which had threatened the validity of a number of drunk-driving convictions. The District initially contended all responsive records were protected by the investigatory records exemption and FOP sued. The District ultimately disclosed many of the records after the investigation was over, but continued to withhold some records it claimed were privileged. The trial court ruled the District had properly invoked the investigatory records exemption and that once the District had disclosed records the case became moot. FOP then appealed. The court of appeals first pointed out that under the investigatory records exemption, the District had the burden of showing that it conducted a document-by-document review to determine if the claimed records actually qualified for protection under the exemption. The appellate court then noted the case was not moot. Agreeing with the District that production of all requested, non-privileged records normally moots a FOIA case, the court observed that "the problem here is that the trial court has not determined whether the District has sustained its FOIA burden by disclosing all of the requested documents to which FOP is entitled. . .[Indeed], FOP questioned the adequacy of the District's production." The court indicated that the District's affidavits did not provide an adequate justification for its claim that the records were generically protected by the investigatory records exemption. The court also pointed out that the District had provided no justification for its subsequent privilege claims. The appeals court sent the case back to the trial court for further proceedings. (*Fraternal Order of Police, Metropolitan Labor Committee v. District of Columbia*, No. 12-CV-351, District of Columbia Court of Appeals, Jan. 2)

New Jersey

A court of appeals has ruled that a plaintiff is not eligible for attorney's fees under the Open Public Records Act unless he or she has made a written request as required under the statute. Ernest Bozzi went to the office of the city engineer of Atlantic City and requested a copy of a bid specification for a heating and cooling contract for the public safety building. According to Bozzi, an employee told him an OPRA form was unnecessary to obtain the records, provided him a 69-page bid specification package, and charged him a flat fee of $25 under the Local Public Contracts Law. Bozzi subsequently filed suit, claiming the City was only allowed to charge five cents per page under OPRA. The trial court agreed and awarded him $11,000 in

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attorney's fees. The City then appealed. The appellate court reversed, noting that "the express requirement for a written record request, unequivocally set forth in [OPRA], cannot be ignored merely because a government record was sought. We are not free to disregard the writing requirement, which would render the statutory provision meaningless and create a circumstance running counter to the express language in OPRA." The court added that "the order granting an attorney fee award in favor of plaintiff as a prevailing party is unsupported and also must be vacated." Nevertheless, the court agreed with Bozzi that the bid specification was a record under OPRA and that the City improperly assessed fees under the LPCL. The court observed that "we recognize bid specifications may not be the type of government records the Legislature had in mind when adopting OPRA. However, it is up to the Legislature to craft an exception to OPRA's fee limits for provision of such documents, not the courts." (*Ernest Bozzi v. City of Atlantic City*, No. A-0532-12T4, New Jersey Superior Court, Appellate Division, Jan. 7)

Pennsylvania

A court of appeals has ruled that the Pennsylvania State Police is not required to disclose the names of all police officers accredited by the Municipal Police Officers' Education and Training Commission because to do so would require the State Police to contact more than 1,100 municipal law enforcement agencies to determine what officers might be conducting undercover or covert operations. While the Right to Know Law requires the disclosure of police officers names, it allows agencies to redact the names of undercover officers. In response to a request from Andrew McGill of the *Pittsburgh Post-Gazette*, the State Police contended that it did not have the information to determine what officers might be undercover. The Office of Open Records rejected the argument, finding instead that the names of officers were required be disclosed and that the State Police could redact those undercover officers. But the appeals court agreed with the State Police that to require the agency to redact the identities of undercover officers would require it to obtain information that it did not have. The court pointed out that "the PSP would be required to coordinate with more than 1,100 municipal law enforcement agencies throughout the Commonwealth, as only those local agencies maintain information relating to which officers are currently performing undercover and/or covert operations. Given the sheer number of departments that the PSP would have to contact, along with the fact that the officers assigned to undercover or covert operations in a department is constantly subject to change, we agree with the PSP that it could not possibly comply with the OOR's Final Determination. Because the OOR ordered the PSP to redact the names of officers conducting undercover and covert operations, but neither the PSP nor MPOETC have a record of which officers are performing those functions, the OOR's Final Determination, in essence, requires the PSP to 'create a record' in violation of Section 705 of the RTKL." However, the court indicated that the information could be compiled by making requests to each municipal law enforcement agency, which would be required to disclose the names of officers after redacting the names of any undercover officers. (*Pennsylvania State Police v. Andrew McGill*, No. 852 C.D. 2013, Pennsylvania Commonwealth Court, Jan. 8)

On remand from the Supreme Court, a court of appeals has ruled that neither the attorney work-product privilege, grand jury secrecy, nor the criminal investigatory exception protects any remaining billing records for representation of several members of the State Senate. The Supreme Court had previously agreed with the appeals court's determination that the attorney-client privilege protected some records that implicated confidential communications, but did not protect the names of clients or general descriptions of legal services. However, the Supreme Court found the court of appeals had improperly ruled that the Senate had waived certain claims by not raising them before the Senate Appeals Officer when defending its actions in withholding certain information about payment records from journalist Marc Levy. This time around the appeals court assessed and dismissed the Senate's other arguments. The Senate argued for the first time on remand that if any part of a record was privileged, the entire record could be withheld. The court rejected the claim, not only on the merits, but also because it exceeded the scope of the Supreme Court's remand. The

Senate next argued that general descriptions of work performed on billing statements were protected by the attorney work-product privilege because disclosure would allow for a better understanding of what attorneys felt was important. The court disagreed, noting that "disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy. They simply explain the generic nature of the service performed and justify the charges for legal services rendered." The court also found that disclosure of billing statements that identified individuals testifying before a grand jury would not reveal anything about what happened before the grand jury. The court pointed out that ""Levy is not attempting to compel disclosure of the *substance* of a witness' grand jury testimony. Rather, he is merely attempting to obtain the client identities in the Senate's billing records." Finally, the court rejected the Senate's claim that the billing records were protected by the criminal investigatory exemption. The court observed that "the general, non-substantive descriptions of legal services, such as making a telephone call and drafting a memo, do not reveal the institution or progress of the grand jury investigation. Rather, the descriptions merely reveal the attorneys' general activities in providing legal advice to the clients." (*Marc Levy v. Senate of Pennsylvania*, No. 2222 C.D. 2010, Pennsylvania Commonwealth Court, Jan. 15)

A court of appeals has ruled that the Oil Region Alliance of Business, Industry and Tourism, a non-profit corporation promoting industrial development in Venango County, is not an agency for purposes of the Right to Know Law. Michael Hadley made a request to the Alliance for information about its employees and salaries. The Alliance told Hadley it was not a public agency. Hadley filed a complaint with the Office of Open Records, which sided with the Alliance. The trial court also upheld the denial. At the court of appeals, Hadley argued the Alliance was a local agency because it was responsible for tourism in the county. The appeals court disagreed, noting that "while stimulating a local economy is a laudable purpose, it is not a substantially governmental one. That [the Tourism Promotion Act] refers to the Alliance as an 'agency' makes the Alliance no more governmental than a travel agency or a modeling agency. We reject the suggestion that the name alone is conclusive." Further, the court rejected Hadley's claim that the Alliance had a government-recognized role in tourism promotion. The court observed that "the Alliance does not contract with any government agency to perform a governmental function. This Court requires a contractual relationship between a third party and an agency to access third-party records." (*In re Right to Know Law Request Served on Venango County's Tourism Promotion Agency*, No. 2286 C.D. 2012, Pennsylvania Commonwealth Court, Jan. 3)

The Federal Courts…

The D.C. Circuit has upheld the district court's ruling that Vern McKinley is not entitled to **attorney's fees** for his FOIA suit against the Federal Housing Finance Agency. McKinley, a consultant, legal advisor and regulatory policy expert, asked the agency for records concerning how it made the decision to place Fannie Mac and Freddie Mac into conservatorship rather than receivership. McKinley filed suit before the agency had responded, but the agency ultimately produced three documents. McKinley sought disclosure of two of the documents, an undated draft chart discussing the strengths and weaknesses of receivership and conservatorship, and a 10-page draft memo on "options addressing a troubled regulated entity." The agency withheld both documents under **Exemption 5 (privileges)**. The district court ruled both documents were protected by the deliberative process privilege, but after an *in camera* review, rejected the agency's assertion concerning the attorney work-product privilege. The district court ordered the agency to release all reasonably segregable non-exempt material and the agency produced heavily redacted versions of both documents. McKinley then filed for attorney's fees. The district court, assumed that he was eligible for attorney's fees, but ruled that he was not entitled to an award. The D.C. Circuit agreed that the district court had properly

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assessed McKinley's entitlement under the four-factor test – (1) the public benefit in disclosure, (2) the commercial benefit to the plaintiff, (3) the nature of plaintiff's interest in the records, and (4) the reasonableness of the agency's withholding. McKinley argued that three phrases in the draft chart—"public perception," "unsafe or unsound practices" and "labor intensive"—revealed for the first time the considerations that played a role in the agency's decision to place Fannie and Freddie in conservatorship. The court, however, disagreed. The court noted that "on the face of the documents, the three phrases appear to be nothing more than boilerplate terms used to compare the strengths and weaknesses of any receivership and any conservatorship in any case. Moreover, because the phrases are contained in a document marked 'draft,' it is not clear that they played a role in the agency's final decision." McKinley argued that the district court had improperly found that his scholarly interest weighed against him. But, the court noted, the district "did not conclude that the second and third factors 'weighed *against*' the award of fees. Rather, it found that they 'neither strongly support. . .nor counsel against' the award of fees." The D.C. Circuit found the agency's exemption claims were reasonable and pointed out that although the district court had found the records were not covered by attorney work-product, it had noted that "the assertion of the work product privilege was not wholly untenable given the documents' mention of the possibility for future litigation.'" (*Vern McKinley v. Federal Housing Finance Agency*, No. 12-5267, U.S. Court of Appeals for the District of Columbia Circuit, Jan. 10)

A federal court in Colorado has ruled that, while the EPA's initial **search** for records concerning litigation brought by WildEarth Guardians concerning the agency's failure to act to implement hazing requirements in Wyoming was inadequate, its subsequent search cured those deficiencies. The court also agreed with the agency that much of the information was protected by **Exemption 5 (privileges)**, but found the agency had failed to explain why it did not conduct a **segregability** review for records claimed under the attorney work-product privilege. The case involved a request by PacifiCorp, a utility seeking information to use to comment in an agency rulemaking. The agency asked 10 employees involved in the WildEarth Guardians litigation to search their email for responsive records. That search produced more than 200 records, of which 166 documents were withheld under the deliberative process, attorney-client, and attorney work-product privileges. In response to the utility's second FOIA request, the agency asked six employees to search their email, a search that resulted in 54 documents, 46 of which were withheld as privileged. Although those email searches yielded the names of 23 other employees who might have responsive documents, their files were not searched until a second review was conducted. The agency found another 230 documents, narrowed the number of responsive documents to 148, disclosing 53 records entirely, 95 records in part, and withholding the rest. The court noted the EPA's first search was clearly inadequate, pointing out that "the EPA provided no information as to the search terms used or they type of search performed." The court added that "the responsive documents revealed an additional 23 employees may have responsive information but they were not asked to conduct a search. Under the facts and circumstances here, any argument by the EPA that such employees were not asked because it was unaware of their involvement would be futile. A simple review of the initial responsive documents would have revealed the need to expand the inquiry." However, the court then found that the agency's second search had encompassed all responsive records. As to documents claimed to be privileged, PacifiCorp argued that any factual material had to be disclosed. Relying on *Fine v. Dept of Energy*, 830 F. Supp. 570 (D.N.M. 1993), the court indicated that under the work-product privilege "purely factual material must be disclosed." As a result, the court found the agency's claims unsubstantiated, noting that "the *Vaughn* index, however, showed, at best. . .that the EPA deemed all factual material as intertwined with the attorney's mental processes and that *no* attempted redaction occurred." Except for one document, the court approved of the agency's redactions under the attorney-client privilege. As to that document, the court observed that "the description of the information shows it was a communication between nonlawyers, but the 'cc'd' included an attorney. The fact that an attorney was copied on a communication, without more, is insufficient to establish the communication is covered by the attorney-client privilege." The court also

approved of the agency's deliberative process privilege claims, noting that "the index describes the documents individually, identifying the type of document; the author; the recipients or persons involved; and the justification for claiming the exemption and what was redacted." (*PacifiCorp v. United States Environmental Protection Agency*, Civil Action No. 13-02187-RM-CBS, U.S. District Court for the District of Colorado, Jan. 8)

Judge Colleen Kollar-Kotelly has dismissed the remainder of Janet Marcusse's suit against a number of agencies for records concerning her criminal conviction. She explained that Marcusse's attempts to focus on her need for the records were misplaced, noting that her arguments "reflect a basic misunderstanding about the scope of the FOIA. In a FOIA action, the district court is authorized only to determine an agency has improperly withheld records and, if so, to compel the release of improperly withheld records. Except in limited circumstances not present here, neither the requester's identity nor the purpose of the request is relevant in a FOIA analysis. Hence, plaintiff's arguments focusing on how the released documents relate to her criminal conviction are simply unavailing in this forum." Marcusse also raised for the first time challenges to the IRS's search, its withholding claims, and its claim that Marcusse had failed to exhaust her administrative remedies. But Kollar-Kotelly indicated that "the court will not consider plaintiff's arguments advanced for the first time at this late stage of the proceedings that she had every opportunity to present during the scheduled briefing period." (*Janet Mavis Marcusse v. United State Department of Justice Office of Information Policy, et al.*, Civil Action No. 12-1025 (CKK), U.S. District Court for the District of Columbia, Jan. 10)

A federal magistrate judge in California has recommended that Jasdev Singh's **Privacy Act** claims be dismissed because he could not show that the failure of Immigration and Customs Enforcement to memorialize assurances Singh was given by an ICE agent when picked up on drug charges that he was non-deportable because he had previously been granted asylum actually caused deportation proceedings to be started against him. According to Singh, he agreed to plead guilty on the drug charge because of assurances that he could not be deported and, instead, would be placed in a minimum security prison, be able to participate in a drug rehabilitation program, and be reunited at the earliest possible time with his family. But because of his drug conviction, Singh was placed in a low security facility in Natchez, Mississippi and received a notice to appear before an immigration judge for removal proceedings. To the extent that Singh was trying to attack his removal proceedings, Magistrate Judge Sheila Oberto noted that "because [several of Singh's] requests all seek to invalidate the decision to commence removal proceedings, the Court has no jurisdiction to grant the injunctive and declaratory relief Plaintiff seeks under the Privacy Act." But Oberto indicated that Singh's attack on his prison assignment was sufficient to proceed under the Privacy Act. Oberto next explained that Singh could not show that the plea assurance had caused the current action. She pointed out that "even assuming the truth of Plaintiff's allegations, i.e., that the prosecuting attorney or an ICE agent promised him he would be non-deportable as part of his plea agreement, this assurance does not itself change the character or nature of his conviction, which is what subjects Plaintiff to removal proceedings. As a result, Plaintiff has not alleged a sufficient causal connection between the Government's failure to document the alleged promise to Plaintiff that he would not be deported in conjunction with his plea and the removal proceedings that were instituted as a result of his conviction." She added that "because there are no facts to show that the Government's failure to document that he was 'non-deportable' proximately *caused* either ICE to proceed with removal proceedings or [the Bureau of Prisons] to classify him with a [Public Safety Factor] designation, Plaintiff fails to adequately state a maintenance or catchall claim under the Privacy Act." Oberto explained that Singh had not shown any actual damages under the Supreme Court's recent ruling in *FAA v. Cooper*, 132 S. Ct. 1441 (2012). She observed that "emotional distress is not considered an 'actual damage'

pursuant to *Cooper*, and Plaintiff's allegation that he has suffered 'special damages' is, as Defendant contends, a legal conclusion and not an actual allegation of damages. . .Other than emotional distress, Plaintiff has stated no facts suggesting a pecuniary injury, and therefore his claim fails to adequately allege any actual damages." (*Jasdev Singh v. United States Department of Homeland Security*, Civil Action No. 12-00498-AWI-SK0, U.S. District Court for the Eastern District of California, Jan. 8)

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