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Washington Focus: An audit of the IRS's FOIA operations by the Inspector General for Tax Administration has shown a growth in the agency's backlog attributable to requests concerning the controversy over granting tax-exempt status for organizations associated with the Tea Party. The audit showed the agency's backlog had grown by 84 percent from 118 in 2012 to 227 in 2013. Of the 62 cases sampled in the audit, the IG found that in roughly 20 percent of the cases the agency may have unintentionally disclosed taxpayer information. . .Steve Aftergood reports in Secrecy News that the NSA recently denied his FOIA request for a congressionally-mandated report on authorized disclosures of classified information to the media. The NSA denied the request, indicating the record was classified and noting that "the document is classified because its disclosure could reasonably be expected to cause exceptionally grave damage to the national security."

Court Skeptical Of DOJ Claims

Concluding that he was bound to defer to the Justice Department's assertions concerning whether or not it could confirm or deny the existence of Foreign Intelligence Surveillance Court orders pertaining to the collection of non-telecommunications data, a federal court judge in New York has expressed unusually strong skepticism of the government's other claims, characterizing them as opportunistic. Finding the agency's arguments frequently contradicted previous claims, Judge William Pauley observed that "the Government's arguments bear the hallmarks of opportunistic rummaging rather than a coherent strategy."

The case was brought by the ACLU, which requested DOJ records on the government's interpretation of Section 215 of the Patriot Act. The records overlapped with a FOIA request submitted by the *New York Times* for a report to Congress from the Attorney General and the Director of National Intelligence concerning the government's use of Section 215. After that document was leaked, the Second Circuit ultimately ruled that the government had waived any legal privilege through public acknowledgment and ordered the government

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to disclose the legal analysis from the original Office of Legal Counsel memo. As a result, the remainder of the ACLU's litigation came down to disclosure of FISC Orders interpreting Section 215.

The agency had initially claimed that no portions of the FISC Orders could be disclosed. But after the Snowden disclosures resulted in substantial declassification of records including those pertaining to the NSA's bulk data collection, the plaintiff in other FOIA litigation seeking similar FISC Orders was able to demonstrate that sensitive classified information could be redacted from the orders while still providing meaningful information. Pauley explained that "the withheld document concerned the Government's violations of an earlier FISC order. The Government could have redacted it to conceal the existence of a bulk collection program, the NSA's involvement, and the type of information collected by the Government, but still reveal that the Government acted 'in a manner that appeared to the Court to be directly contrary' to a previous court order'" and that the FISC had considered taking action against those persons responsible for the misrepresentations. Pauley noted that "these are by no means 'unintelligible sentences and phrases that are devoid of any meaning."

The government had previously insisted that because of its rules and regulations, FISC records were not available under FOIA. However, it now claimed it became aware in September 2013 that FISC orders were subject to FOIA. But the ACLU pointed out that when it requested records in 2007 directly from the FISC, the government argued that it had to proceed under FOIA. Pauley observed that "the Government appears to have been dissembling in 2012 when it argued 'the rules and procedures of the FISC restrict the Government from disclosing FISC records.' The same inference could be drawn from the Government's current argument that it did not know until June 2013 that there was no restriction on FOIA releases of FISC documents."

The government's current argument was that disclosure of the FISC orders would contain NSA markings that would reveal that agency's involvement with Section 215, a classified fact at that time. But Pauley explained that "this obscure argument is particularly elusive. Fortunately, it need not be addressed. It is enough that by advancing incorrect and inconsistent arguments, the Government acted without the candor this Court expects from it."

Pauley summarized his concerns, pointing out that "these developments give this Court pause. The Government's argument that it believed until June 2013 that FISC orders could not be produced in response to FOIA requests strains credulity. Its assertion on the initial summary judgment motion that segregating non-exempt information in FISC orders would leave only 'unintelligible sentences and phrases' was incorrect. And it then failed to produce or list on the *Vaughn* index three documents which the Government had disclosed elsewhere. These inconsistencies shake this Court's confidence in the Government's submissions. The deference the Government ordinarily receives in FOIA cases is rooted largely in the courts' trust that the Government will comply with its statutory obligations. That compliance is not apparent here."

He concluded the government's *Glomar* response for records pertaining to FISC orders dealing with other types of data collection was justified, but he noted that "because this Court has little faith in the Government's segregability determinations, the other documents in the Government's *Vaughn* index must be submitted for *in camera* review." He observed in a footnote that a federal court in California had already upheld similar claims, but only after conducting an *in camera* review.

Although it was technically unclear whether the government had intended to invoke a *Glomar* response for the non-telecommunications collection FISC orders, Pauley found it was justified under Exemption 3 (other statutes) because it qualified as "sources or methods" under the National Security Act.

The ACLU questioned whether acknowledging the existence of non-telecommunications metadata bulk collection programs would reveal sources or methods. Finding that it could, Pauley indicated the ACLU was taking too narrow a view. He explained that "assuming for a moment that the Government is not engaging in the bulk collection of anything but telephone records, it is entitled to keep that fact—its lack of additional sources or methods—classified. To acknowledge that would alert potential adversaries that they need not be concerned about bulk collection of other types of information, negating that deterrent effect of not knowing whether the Government is watching or listening. But if the Government is collecting other information in bulk, knowing that could permit a sophisticated adversary, together with disparate other pieces of information, to make an educated guess as to what the Government is doing. A sophisticated adversary could determine what type of information the intelligence community would likely be interested in collecting in bulk and what types of information could in fact be easily collected. Admitting the existence of other bulk collection programs could permit these adversaries to predict the Government's activities and evade them." (*American Civil Liberties Union v. Federal Bureau of Investigation*, Civil Action No. 11-7562, U.S. District Court for the Southern District of New York, Oct. 6)

Views from the States…

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

Florida

A court of appeals has ruled that the City of St. Pete Beach violated the notification process for passing a city ordinance. The ordinance was an amendment to the City's comprehensive plan and James Anderson argued that since the City had failed to provide advance notice of its intent to consider the amendment it was invalid. He also argued the City had violated the Sunshine Law by holding seven non-public discussions before passage of the amendment. The court of appeals agreed the amendment was invalid because the City had failed to provide notice, but, while it also found the City had violated the Sunshine Law it declined to invalidate the amendment on those grounds as well. The City claimed the closed meetings were permissible because the city council was discussing potential litigation from passage of the amendment. But the court noted that "while some of the discussion at these meetings did in fact involve the costs associated with the pending litigation, by and large the meetings pertained to finding a way to readopt the comprehensive plan amendment that had been invalidated [previously] by the court and to avoid future litigation regarding the adopted amendment. The discussions also reveal that the City sought to keep its strategy secret in order to ensure the success of its planned strategy to readopt the comprehensive plan amendment while at the same time insulating it from future challenges." Recognizing that it had already invalidated the amendment, which was Anderson's only remedy under the Sunshine Law, the court agreed that Anderson was entitled to a declaration that the City's actions had violated the Sunshine Law. (*James Anderson v. City of St. Pete Beach*, No. 2D12-5969, Florida Court of Appeal, Second District, Oct. 15)

Indiana

The Supreme Court has ruled that, although death certificates are not available directly from the State Board of Health, they are subject to disclosure under the Access to Public Records Act from county health departments. When the *Evansville Courier & Press* requested death certificates from the Vanderburgh County Health Department, the department denied the request, claiming two statutory provisions prohibited disclosure of death certificates from health departments unless the requester was involved in a legal matter involving the

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decedent's estate. Although the Public Access Counselor sided with the newspaper, both the trial court and the court of appeals ruled in favor of the county health department and the newspaper appealed to the Supreme Court. Reviewing the history of the development of health departments in Indiana, the Supreme Court noted that from their inception in 1881 county health departments had been required to issue and maintain death certificates and that the state health department acted as a clearinghouse for maintaining them. The Supreme Court found that neither provision exempted death certificates from disclosure by county health departments. Dismissing the provision limiting disclosure of death registration information to individuals involved in a decedent's estate, the court pointed out that "as we read the statute, the General Assembly has drawn a distinction between a certificate of death, which is intended to record cause of death data for use by health officials, and a certificate of death registration, which is intended to authenticate the death for the purpose of property authentication. The former is a public record, while the latter is confidential." The other provision provided an exemption for death certificates held by the state health department. The court observed that "a plain reading of this language, however, demonstrates that it applies to the *State* Department of Health, not to local health departments. Thus we hold [this section] does not operate to exempt death certificates retained by local health departments from APRA's disclosure requirements." The court observed that "this conclusion creates an apparent inconsistency. . .But we cannot say with certainty that this madness has no method." The Vanderburgh County Health Department also argued that it did not have the death certificates because they were electronically filed with the state health department. However, the court indicated that "each county health department has an unambiguous statutory obligation to collect and maintain death certificates. . .Now, we have modernized the process. . .This change is one of form, however, not substance. The essence of the law—that the local health department must collect and maintain death certificates—remains the same regardless of the means used to comply with it." (*Evansville Courier & Press v. Vanderburgh County Health Department*, No. 82S04-1401-PL-49, Indiana Supreme Court, Oct. 7)

Kentucky

A court of appeals has ruled that the University Medical Center, which operates the University of Louisville Hospital, is a public agency subject to the Open Records Act because the University of Louisville, which is a state university, controls the nominating process for UMC's board of directors. Although UMC was privately created in 1995 as a vehicle for operating the University of Louisville Hospital, the Office of Attorney General, in response to a series of public records requests to UMC, found it was a public agency because it was controlled by the University of Louisville. However, when UMC challenged the AG's order in court, the trial court concluded UMC was a public agency not because it was controlled by a public agency, but because the majority of its governing body was appointed by a public agency. At the court of appeals, the appellate court rejected that AG's rationale, but accepted the trial court's justification. Rejecting the AG's conclusion, the appeals court noted that "while it is obvious UofL was instrumental in UMC's creation, its role was only as an instigator and beneficiary, neither of which makes UMC a public agency. UofL did not become a member of UMC until *after* UMC had been incorporated and was managing ULH." The court pointed out that "while [UMC was] created in contemplation of and preparation for a future event involving UofL, the reason for the creation is not our focus. The key inquiry in this hurdle is the nature and character of the creators, and in UMC's case, it was two private citizens overseeing two private healthcare providers—Jewish and Norton; it was not UofL, a public agency." UMC's board was composed of directors appointed by the University and community directors. The court explained that the President of the University controlled the nominating committee for all directorships. The court pointed out that "while Community Directors are not directly appointed by UofL, if a potential candidate cannot be considered and ultimately proposed to the Board by the Nominating Committee, he/she cannot be elected by the entire Board. Thus, while UofL may not control the ballot box, it clearly controls the path to the ballot." Having found that UMC was a public agency, the appellate court sent the case back to the trial court to determine if the requested information was

disclosable under the Open Records Act. (*University Medical Center, Inc. v. American Civil Liberties Union of Kentucky, et al.*, No. 2013-CA-000446-MR, Kentucky Court of Appeals, Oct. 3)

Maryland

The Court of Special Appeals has ruled that the trial court erred when it accepted the Maryland State Police Department's claim that records of an investigation of Sergeant John Maiello for using racial slurs in a voicemail left on the phone of Teleta Dashiell, a potential witness in a case, are completely exempt as personnel records. Dashiell filed a complaint against Maiello, which was sustained, resulting in disciplinary action. Dashiell then filed a public records request with the State Police for the records of Maiello's investigation and disciplinary action. The State Police denied the request because the records were exempt personnel records. The agency also claimed they were exempt under the Law Enforcement Officers' Bill of Rights, and exemptions for deliberative process and investigatory records. The trial court concluded the records clearly dealt with personnel matters and upheld the agency's denial on that basis. Dashiell then appealed and the Court of Special Appeals found that under the recent decision in *Md. Dept of State Police v. Md. State Conference of NAACP Branches*, 59 A.3d 1037 (2013), the State Police were required to disclose any non-personally-identifying information and to also consider any other applicable exemptions. Because a "person in interest" has a greater right of access to such records, Dashiell argued that she, as the complainant in Maiello's investigation, qualified for heightened access. The court, however, disagreed, noting that "a 'person in interest' relates to the status of an individual, not to the veracity of the allegations of misconduct. . . [T]he complainant. . .triggered the investigation by the MSP and [she] is not the subject of the investigation itself. Sergeant Maiello was the subject of the investigation, and thus a 'person in interest.'" Turning to the effect of *NAACP Branches*, the court pointed out that "under *NAACP Branches*, the trial court was required to determine whether the requested documents were exempt from disclosure under any provision of the MPIA asserted by the MSP." The appellate court sent the case back to the trial court for further determination based on the appellate decision, noting that "it is difficult for us to see how the trial court could properly determine the applicability of any exemption under the Act without having detailed information about each document withheld or conducting an *in camera* review of all such documents." (*Teleta S. Dashiell v. Maryland State Police Department*, No. 1078 Sept. Term 2011, Maryland Court of Special Appeals, Oct. 8)

Pennsylvania

A court of appeals has ruled that the Office of Open Records properly adopted the exemption claims made by the Department of Public Welfare in denying records to Cecilia Clinkscale. Clinkscale requested her file from the Philadelphia County Assistance Office. The Department of Public Welfare indicated the records fell under the exemption for records related to the application or receipt of social services. When Clinkscale appealed, OOR agreed. In court, Clinkscale argued that she had a right to the records because they were about her. Rejecting that claim, the appeals court noted that "the fact that Requestor is seeking her own file has no bearing on whether the requested records will be disclosed through a [Right to Know Law] request." The court added that "the RTKL must be interpreted and applied without regard to the Requestor's identity beyond meeting the RTKL's requestor definition." (*Cecilia Clinkscale v. Department of Public Welfare*, No. 2398 C.D. 2013, Pennsylvania Commonwealth Court, Oct. 6)

A court of appeals has ruled that the Department of State performed adequate searches for records concerning the Department's prosecution of Richard Glunk for immoral conduct by a physician, which resulted in a 60-day suspension and $5,000 civil penalty. Glunk made a series of 12 requests, many of which overlapped each other, for his records. He challenged the agency's performance when it was established that the department misrepresented when it originally mailed its extension of time for processing his request. But

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the court indicated that "we conclude that [the department's open records officer's] erroneous statement of fact regarding the letter's mailing date does not render her subsequent affidavits unreliable *per se*. It is well-settled that the truthfulness of the affiant is a matter that goes to the credibility and weight of the evidence, which are assessments to be made by the fact-finder." (*Richard P. Glunk v. Department of State*, No. 286 C.D. 2014, Pennsylvania Commonwealth Court, Oct. 17)

Washington

A court of appeals has ruled that because Arthur West failed to argue any Public Records Act claims other than opposing former Gov. Christine Gregoire's assertion of executive privilege, he waived those claims. Further, West also failed to argue why he had a particularized need for the records protected by executive privilege even though he was on notice that a three-part test used in federal courts had been proposed for use in Washington by the state government. West requested all records for which Gregoire had asserted executive privilege. When he the governor's office failed to provide all the records, West filed suit. At a show cause hearing, Gregoire argued for adoption of an executive privilege exemption and West opposed such an exemption, claiming it was not in the statute. The trial court sided with Gregoire and dismissed West's suit. The Washington Supreme Court ruled shortly thereafter in another case that an executive privilege did apply in Washington and adopted the three-part federal test. West appealed his case, claiming the trial court erred by failing to consider his other claims and that it had not considered whether he had a particularized need for the records he had requested. Rejecting both claims, the court noted that "a show cause proceeding is, in effect, the PRA claimant's trial. At the very least, it operated like a motion for summary judgment on the claimant's PRA claims. West was required to address all the claims that he wanted to pursue against Gregoire in the show cause proceedings that he initiated. Because he did not even mention any claims not involving the executive privilege in his briefs or in oral arguments, he is deemed to have abandoned those claims." West argued that the trial court unfairly applied the three-part test without providing him proper notice. But the court pointed out that "West cites no authority for the proposition that a trial court cannot adopt and apply a legal analysis as a matter of first impression when the parties have fully briefed the issue. West had every opportunity to present an argument that he did have a particularized need for the records requested, and he should not be allowed to benefit from his failure to do so." (*Arthur West v. Christine Gregoire*, No. 45812-8-II, Washington Court of Appeals, Oct. 21)

The Federal Courts…

A federal magistrate judge in California has ruled that the CIA properly invoked a *Glomar* response to neither confirm nor deny the existence of records concerning Jean Soetre under **Exemption 3 (other statutes)**, but that it has not yet sufficiently justified the **adequacy of its search** for records pertaining to several other individuals allegedly linked to John F. Kennedy or Robert F. Kennedy's assassinations that were requested by Anthony Bothwell. Bothwell made two requests for named individuals. The agency indicated that it had searched its National Clandestine Service and the Directorate of Support and found no responsive records. The agency explained that it had also searched a database of records collected under the JFK Assassination Records Collection Act, but found no responsive records. Assessing the agency's description of its search, the magistrate judge noted that "it does not name the databases searched by the NCS and DS, nor does it provide a scheme of the database systems or any details of the final search strategy other than the use of names." While the agency claimed its database search would have located paper records as well, the magistrate judge pointed out that "what [the agency's affidavit] fails to explain, and what the CIA could not clarify at oral argument, is what exactly this 'CIA database' is. It is unclear if [the agency affidavit] is referring to the JFJK database, one of the databases within NCS or DS, or whether she is referring to an entirely new database that was not

mentioned in [the] initial declaration." While the CIA had claimed **Exemption 1 (national security)** as well, the magistrate judge found its *Glomar* response was plainly justified under Exemption 3. The magistrate judge observed that "once no responsive documents were found in [the JFK Act] database, the CIA was justified in invoking its Glomar Response. The Court recognizes the profound public interest in learning about the Kennedy assassinations, but this does not 'override the CIA's ability to claim proper FOIA exemptions.'" (*Anthony P.X. Bothwell v. Central Intelligence Agency*, Civil Action No 13-05439-JSC, U.S. District Court for the Northern District of California, Oct. 9)

Judge James Boasberg has ruled that the State Department conducted an **adequate search** for records concerning the 2009 death of Michael Jordan Rollins in Taiwan and that it properly withheld some records under **Exemption 5 (privileges)** and **Exemption 6 (invasion of privacy)**. Delores Rollins requested records concerning her son's death and ten months later, after Rollins had filed suit, the agency produced195 records, disclosing 158 in full and 37 with redactions. Rollins claimed the agency's search was inadequate primarily because of references in released documents to attachments that were not disclosed. Boasberg acknowledged that when information comes to light during a search that provides clear leads for further searches the agency is required to pursue those leads. But here, the mere absence of the documents did not suggest other locations that had not been searched. He noted that "her only concern is that she did not receive a handful of records referenced in those produced. Yet she does not suggest that the disclosed records provide any leads to other offices, databases, or files that should have been searched, or even to additional search terms or methods the agency should have used." He found a series of emails from agency attorneys concerning U.S. authority to undertake certain actions were protected by the deliberative process privilege or the attorney-client privilege. Rollins also challenged the deletion of the name of a third party that died in Taiwan at about the same time. Because the agency had indicated the deaths were unrelated, Rollins found the third party's family had a privacy interest that outweighed any public interest. Rollins argued disclosure could lead to better oversight of the agency for purposes of dealing with the deaths of U.S. citizens abroad, but Boasberg observed that "the third party's name, however, is just a name. Plaintiff offers no evidence or argument that this individual died in mysterious circumstances or that disclosure of his or her identity would shed any light on the Department's performance of its statutory duties." (*Delores Ann Rollins v. United States Department of State*, Civil Action No. 13-1450 (JEB), U.S. District Court for the District of Columbia, Oct. 8)

On remand from the Ninth Circuit, a federal court in California has ruled that the Census Bureau conducted an **adequate search** for records concerning John Kelly's employment in 2010 as a census taker in the San Francisco office. Finding the court had dismissed Kelly's action before conducting a detailed examination of the agency's responses, Judge Jeffrey White this time assessed the Bureau's responses to Kelly's multiple requests and concluded the agency had acted properly. Kelly complained the agency had misinterpreted his requests as limited to job applicants and not people who were hired. White indicated that Kelly's requests referred only to applicants, but pointed out that an agency affidavit "makes it clear that after Kelly appealed the Census's final response and thereafter clarified his request to include hirees, Census created a computer program to generate documents responsive to Kelly's request." In response to one of Kelly's requests asking for his employment records, the agency treated it as a request under the Privacy Act. Kelly argued this limited the search to a specific system of records. But White noted that "Kelly sought records under the Census's control from which information about Kelly could be retrieved by a search using his name. Furthermore, Kelly does not explain specifically what 'limitation' results from construing his request under the Privacy Act instead of under the FOIA." (*John M. Kelly v. U.S. Census Bureau and U.S. Department of Commerce*, Civil Action No. 10-04507 JSW, U.S. District Court for the Northern District of California, Oct. 21)

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A federal court in Wisconsin has ruled that the IRS has failed to show that Christian Ibeagwa's suit for his 2011 tax forms is moot because the agency had already provide Ibeagwa with all the responsive documents. The agency produced his 1040 Form, but claimed that it could not find a Form 4136 Ibeagwa contended he had filed as well. The court noted that "the declaration submitted by the disclosure specialist describes the steps she took to locate plaintiff's requested documents, but she does not explain *why* she chose to look where she did and whether there may be other places the documents could be found." The court added that "even with respect to the places defendant searched, it is not clear whether the search was reasonable. The disclosure specialist says in her declaration that the Federal Records Center did not attach a Form 4136 to the Form 1040X it sent, but the specialist does not say whether staff at the center attempted to locate the Form 4136 or, if they did, what efforts they made." (*Christian C. Ibeagwa v. Internal Revenue Service*, Civil Action No. 14-369-bbc, U.S. District Court for the Western District of Wisconsin, Oct. 6)

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