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Washington Focus: After dropping the public interest balancing test for Exemption 5 but retaining a provision requiring that deliberative process material would lose its privileged status after 25 years, the Senate Judiciary Committee has passed the "FOIA Improvement Act of 2014." While open government advocates believe there is still enough time for the legislation to pass the Senate and be reconciled with a similar bill that has already passed the House, the likelihood that time will run out before the bill gets through Congress remains a distinct possibility. . .President Barack Obama signed the "Presidential and Federal Records Act Amendments of 2014" just prior to the Thanksgiving holiday. The amendments, sponsored by Rep. Elijah Cummings (D-MD), put an end to the practice of never-ending reviews by White House attorneys for records of prior presidents the National Archives has slated for public disclosure. Under the new law, the current and affected presidents have 60 days to review such records. That period can be extended once for an additional 30 days. According to Josh Gerstein of Politico, the law also provides that emails of government employees sent on private accounts about government business must be incorporated into official records systems.

Court Allows Submitter To Defend Confidentiality Claims

There has long been disagreement over the proper role of agencies in assessing the disclosability of business-submitted records and, ultimately, defending a decision to disclose or withhold such records in response to a FOIA request. While agencies have sometimes argued that they are not truly stakeholders and that businesses should probably play a larger role in convincing courts that records are protected by Exemption 4 (confidential business information) and relevant statutes like the Trade Secrets Act, under FOIA agencies bear the burden of persuading a court that a claimed exemption—including any commercial-related provisions—is applicable. To the extent that businesses are willing to trust government to adequately protect their interests they bear no legal obligation to participate in the defense of such information when a requester goes to court. However, a recent case provides an interesting discussion of the circumstances under which a

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company may intervene by right to protect its interests and the claims a plaintiff may make in an attempt to keep the company from participating.

The case involved a request from 100Reporters, a non-profit journalism organization, to the Justice Department for records related to the compliance monitoring program established by Siemens Aktiengesellschaft in connection with its 2008 plea agreement for violations of the Foreign Corrupt Practices Act. DOJ denied the request on the basis of Exemption 7(A) (interference with ongoing investigation or proceeding). After the agency upheld its decision on appeal, 100Reporters filed suit. DOJ did not inform Siemens of the request until several months after the suit was filed. Less than a week later, both Siemens and Dr. Karl Waigel, who served four years as an independent corporate compliance monitor to Siemens following the resolution of the ECPA investigation, filed a motion to intervene in the lawsuit as a matter of right under Federal Rule of Civil Procedure 24(a).

Judge Rudolph Contreras explained that under Rule 24(a), an applicant wishing to intervene needed to file to intervene in a timely manner, to show an interest relating to the property or transaction that is the subject of the suit, to show that the disposition of the action might impair or impede the applicant's ability to protect its interests, and to show that its interests might not be adequately represented by the existing parties. Finally, the party seeking to intervene as of right must show that it had standing to participate in the lawsuit. Contreras found both Siemens and Waigel qualified under the timeliness factor, pointing out that "to date, no substantive progress has occurred in this action, and the Court finds that allowing Siemens to intervene at this time would not unduly disrupt the litigation or pose an unfair detriment to the existing parties."

Contreras has little problem finding that Siemens had a legally protected interest in the records requested by 100Reporters. He pointed out that "indeed, preventing the disclosure of commercially-sensitive and confidential information is a well-established interest sufficient to justify intervention under Rule 24(a)." But 100Reporters questioned Waigel's legal interest in intervening since he was essentially arguing that disclosure would harm future compliance monitors by failing to protect the confidentiality of their reports and communications with government agencies. Contreras rejected 100Reporters' suggestion that Waigel must show an interest protected by an exemption before being allowed to intervene. Contreras noted that "such a requirement would, in fact, be putting the cart before the horse because a ruling on the merits of an intervenor's right to withhold information under a certain FOIA exemption clearly would be premature at this embryonic stage of the litigation." Instead, he observed, "it is sufficient for purposes of Rule 24(a) that the Monitor has an interest in maintaining the confidentiality of his reports and communications. . .[T[he Monitor should have an opportunity to litigate the merits of his interest, including whether the interest actually is covered by a FOIA Exemption, in a single proceeding involving all interested parties."

100Reporters argued that as long as DOJ continued to insist that all the records were protected by an exemption the government's interests were aligned with those of Siemens and Waigel. But Contreras indicated that the ruling in *Appleton v. FDA* 310 F. Supp 2d 194 (D.D.C. 2004) had held that "by the very nature of FOIA litigation the government entity and the private intervenor will possess fundamentally different interests—the government is interested in fulfilling its FOIA obligations; the intervenor is interested in preventing disclosure of its confidential materials—such that the government entity is quite unlikely to provide 'adequate representation.'" He added that "the fact that Siemens and the DOJ presently agree on a litigation posture does not mean that the DOJ necessarily will adequately represent Siemens's interests throughout this action, as the DOJ remains free to change its strategy during the course of litigation." Contreras pointed out that "Siemens's presence in this litigation will ensure that, at the very least, its Exemption 4 argument is asserted as strongly as possible because Siemens is in a unique position to articulate the need to withhold its own confidential materials under that FOIA Exemption." Contreras agreed that DOJ and Waigel also had the same basic interest in non-disclosure, but noted that "that alone, however, does not mean that DOJ will

adequately represent the Monitor's interests as contemplated by Rule 24(a), especially when the Monitor intends to assert arguments under FOIA Exemption 4."

Finally, Contreras found that Siemens and Waigel both had standing. He noted that "when, as here, it is clear that the FOIA requestor seeks the release of documents that are likely to contain the intervenor's confidential information, the intervenor's injury is both particularized and sufficiently imminent. It is not surprising then, that 100Reporters cannot cite a single FOIA case in which a court denied on standing grounds the application of a prospective intervenor whose *own* confidential materials were the clear subject of the FOIA request. Instead, though there always exists significant overlap between Rule 24(a)'s interest requirement and Article III's injury-in-fact requirement, that likely never is truer than in a situation such as this, where the imminent and concrete risk of the proposed intervenor's confidential materials being released through a successful FOIA action is obvious." (*100Reporters LLC v. United States Department of Justice*, Civil Action No. 14-1264 (RC), U.S. District Court for the District of Columbia, Dec. 3)

Retirements Highlight Individual Contributions

Since becoming editor of *Access Reports* in 1985, I have had the privilege of working with a number of talented government and non-government professionals whose commitment to FOIA is unquestioned. Whether these individuals fell along a spectrum of believing that all government records should be public to believing that almost no government records should be disclosed, the integrity and dedication of FOIA professionals has been impressive indeed. Now that I've been a part of that community for nearly 30 years, I am beginning to experience the retirements of individuals whose careers and accomplishments were largely contemporaneous. Several good friends whose expertise and efforts made my life richer have already retired. I'm thinking particularly of people like Mitch Pearlman, executive director of Connecticut's FOI Commission for decades, Frosty Landon, head of Virginia's Coalition for Open Government, and Harold Relyea, the resident government information guru at the Congressional Research Service. But this year, at least three good professional friends retired—Fred Sadler, who headed FDA's FOIA Office, Will Kammer, high up at DOD's FOIA Office, and Miriam Nisbet, the first head of the Office of Government Information Services. Because Miriam's retirement comes at a crucial time for the future of OGIS, her contributions are particularly of note. And her friendship and professionalism are terrific illustrations of how individuals can affect change.

I first met Miriam when she was at OIP where she was responsible for initial responses and denials. I had requested an analysis of the effect of proposed FOIA amendments supported by the Reagan administration. OIP released the report, but redacted all the analytical portions under Exemption 5 (deliberative process privilege). Assuming the decision was unlikely to change as the result of an appeal, I filed my first and only suit in district court, which in itself was an experience. We won because Judge Harold Greene ruled DOJ had failed to pinpoint any decision to which the report contributed, a requirement that had recently been highlighted by the D.C. Circuit in its opinion in *Senate of Puerto Rico v. Dept of Justice*, 823 F.2d 574 (D.C. Cir. 1987). In my naivety, I assumed the government would disclose the document and settle for a small amount of attorney's fees. It came as quite a shock when the U.S. Attorney litigating the case informed me the government had appealed to the D.C. Circuit. My D.C. Circuit panel included Clarence Thomas, who, true to form, said nothing during oral arguments. But in *Access Reports v. Dept of Justice*, 926 F.2d 1192 (D.C. Cir. 1991), the court essentially threw out the requirement that privileged documents must relate to an actual decision and adopted a standard allowing agencies to withhold any qualifying records that could be considered part of the deliberative process—in this case, DOJ's strategy for handling congressional criticism of the proposed FOIA amendments.

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Miriam and I appeared together on a panel on recent litigation at the ASAP Western Regional Training Conference in San Francisco shortly after the *Access Reports* decision was issued. While I was more than willing to discuss the bizarre nature of the government's litigation strategy, Miriam stuck to the facts, explaining dispassionately how the decision fit into the evolving interpretation of Exemption 5. I happened to be the president of ASAP that year and Miriam went on to become president later. The existence of ASAP has been a crucial linchpin in bringing together people of disparate views and it has always been a terrific place to meet and become friends with other professionals.

Miriam left OIP soon thereafter to work at the National Archives. After spending time there, she became counsel to the Washington office of the American Library Association. Then, in a job that was the envy of many of her colleagues, she took a position with UNESCO in Paris. When OGIS was created as the result of the OPEN Government Act of 2007, Miriam was hired as its first director and came back to work at the National Archives. Although OGIS was modeled after successful ombudsman-like offices in several states, the idea of grafting a mediation process onto the litigation-driven scheme of the federal FOIA presented challenges that have not yet been resolved. But Miriam has spent the past five years starting the bare-bones office from scratch and injecting it into the debate over access to information. While OGIS does not have authority to issue binding opinions, such an office lives or dies based on its integrity and moral suasion. Miriam's soft-spoken professionalism has been a key to establishing OGIS as a crucial player in the debate. Her retirement is certainly well-deserved, but I and many other members of the FOIA community are going to miss knowing she is charge.

Views from the States...

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

Connecticut

A trial court has ruled that the FOI Commission properly found that various records concerning emails exchanged between two attorneys who worked under a contract for the Connecticut Resources Recovery Authority and other staffers qualified for protection under the attorney-client privilege. Michael Harrington argued that the advice sought in the emails did not constitute legal advice. But the court noted that "where the attorneys were receiving requests and providing advice to their client that sufficiently meets the attorney-client privilege." Harrington also challenged the application of the privilege for an exchange between two non-attorneys at CRRA which was sent to one of the attorneys. The court observed that "the FOIC had substantial evidence to support a finding that communications to [the attorney] were made as part of a design to keep the attorneys involved in the CRRA decision-making process." Finally, Harrington argued some emails had been shared with two persons from the attorney's law firm, waiving the privilege. But the court pointed out that "these persons were agents of [the attorney] in assisting him in giving advice to the CRRA. Thus the confidentiality of the documents was not lost." (*Michael C. Harrington v. Freedom of Information Commission*, No. CV 13 6022951S, Connecticut Superior Court, Judicial District of New Britain, Nov. 12)

District of Columbia

A trial court has ruled that the D.C. Speech and Debate Statute, which parallels the Speech and Debate Clause of the U.S. Constitution and provides immunity for actions taken by members while serving in their legislative capacity, qualifies as a prohibition against disclosure under the D.C. FOIA of records concerning

several projects being considered by City Council committees that impacted on McMillan Park. When Kirby Vining, a citizen activist and one of the founders of the Friends of McMillan Park, requested information about the projects from Ward 5 Councilmember Kenyan McDuffie, McDuffie claimed all the records were protected by the Speech and Debate Statute, except for a handful of records that were protected under the exemption for the deliberative process privilege. The court pointed out that "the Speech or Debate statute meets the requirements of a withholding statute, as set forth in the [D.C. FOIA]. First, the language of the statute is mandatory, leaving no discretion and stating: 'For any speech or debate made in the course of their legislative duties, the members of the Council ***shall*** not be questioned in any other place. . .Therefore, so long as the conduct at issue is a legislative duty or act, the agency that received the FOIA request has no discretion in withholding the information." The court observed that "although Plaintiff argues that the Speech or Debate statute provides immunity but does not prohibit disclosure, this position is not supported by case law. . .'The D.C. Circuit has explicitly recognized that the [Speech or Debate] Clause provides both testimonial immunity and a ***nondisclosure privilege*** pursuant to which legislators cannot be required either to produce documents or to answer questions, whether in a deposition or on the witness stand.' Therefore, the Speech or Debate statute meets the requirements of a withholding statute, as set forth in FOIA, and the Council many withhold certain documents pursuant to the Speech or Debate statute." The court indicated that "in this case, the FOIA request was sent directly to Councilmember McDuffie, rather than to the Council. Nevertheless, even if it had been sent directly to the Council, the same legislative immunity that protects Councilmember McDuffie and his staff would protect the Council in general, so long as the activities at issue constitute legislative activities." The court added that "in addition, the Court finds that the Speech or Debate statute protects Councilmember McDuffie, his staff and any other persons who were appointed or authorized by him to participate in legislative activity, which includes both formal and informal investigations and fact-finding." (*Kirby Vining v. Council of the District of Columbia*, No. 2014 CA 000568 B, District of Columbia Superior Court, Nov. 4)

Minnesota

The Commissioner of Administration has found that the contract and non-disclosure agreement for the "Stingray II" and "Kingfish" cellular exploitation equipment between the Harris Corporation and the Department of Public Safety should be disclosed to the Star Tribune Media after redaction of data protected by the Data Practices Act. Noting that the Star Tribune had already obtained a copy of the contract between Harris and the Hennepin County Sheriff's Office, Acting Commissioner Matthew Massman noted that "contracts and NDAs likely contain general terms and other data that do not qualify for the protection in the [statute]. However, if any of the data elements in the contracts and NDAs meet the requirement of deliberative process and investigative techniques as previously opined by the commissioner, DPS/BCA should redact and properly protect those data." (Advisory Opinion 14-018, Minnesota Department of Administration, Nov. 17)

New York

A trial court has rejected the invocation of a *Glomar* response by the New York City Police Department neither confirming nor denying the existence of records concerning any alleged surveillance or investigation of Samir Hashmi and the Rutgers University Muslim Student Association. Based on press accounts that the NYPD had conducted surveillance on a number of Muslim groups in the metropolitan area, Hashmi requested records concerning himself and the Rutgers Muslim Student Association. In response, the police department borrowed the federal *Glomar* response and when Hashmi filed suit the police department urged the court to recognize the *Glomar* response as applicable to New York's Freedom of Information Law. In a recent case, *Abdur-Rashid v. New York City Police Dept*, 992 N.Y.S.2d 870 (2014), a different trial court judge was persuaded by the argument and allowed the police department to apply the *Glomar* response. This time, the court rejected the *Glomar* argument. The court explained that "the decision to adopt the Glomar

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doctrine is one better left to the State Legislature, not to the Judiciary." The court pointed out that "the insertion of the Glomar doctrine into FOIL would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities" and added that "a Glomar response virtually stifles any adversary proceeding." Observing that the *Glomar* doctrine had originally arisen in the context of national security, an area not directly applicable to New York law, the court noted that "there is nothing in the record before the court that indicates the NYPD's work has been compromised by its inability to assert a Glomar response. To the contrary, case law demonstrates that the NYPD has been able to protect sensitive information very well within the existing procedures the NYPD currently provides." (*Samir Hashmi v. New York City Police Department*, No. 101560/2013, New York Supreme Court, New York County, Nov. 17)

Pennsylvania

Reversing a 4-3 decision by an *en banc* court of appeals finding the Pennsylvania Gaming Control Board had violated the Right to Know Law when the agency failed to respond to an email request from James Schneller, the Pennsylvania Supreme Court has ruled that Schneller's request was not valid because it was not addressed to the open records officer as required by the statute. The statutory provision for making a RTKL request provides in part that "a written request must be addressed to the [designated] open-records officer. Employees of an agency shall be directed to forward requests for records to the open-records officer." Although Schneller had not addressed his request to the open-records officer, the Office of Open Records ruled in his favor, concluding that since agency employees were obligated to forward requests to the appropriate office the Gaming Control Board violated the RTKL by failing to do so. The Gaming Control Board took the position that Schneller's request was not valid because it was not properly addressed to the open-records officer. While the appeals court sided with OOR, the Supreme Court reversed. The Court pointed out that "it is clear that the General Assembly intended to place the onus on the requestor to address his own request to the appropriate employee, *i.e.*, the open-records officer." Observing that this meant at least identifying the open-records officer as the intended recipient of a request, the Court added that "by addressing the open-records officer in some logical, reasonable fashion—which imposes no great burden—the requestor gives all employees so contacted the notice required that his written request is submitted pursuant to the RTKL." The Court explained that "here, the requestor failed to address his request to the open-records officer in any fashion, and this failure invalidated his request—albeit only insofar as it relates to any rights that he would have to treat the open-records officer's failure to respond as a deemed denial by the same, thus entitling him to appeal to the OOR." The Court declined to address the scope of an agency's obligation to forward a validly-addressed request until a future case in which the issue arose more directly. (*Pennsylvania Gaming Control Board v. Office of Open Records*, No. 67 MAP 2013, Pennsylvania Supreme Court, Nov. 10)

A court of appeals has ruled that the Governor's Office of Administration cannot withhold the county of residence for law enforcement officers in response to a request for address-identifying information from Pennsylvanians for Union Reform. While an exemption specifically protects home address information of law enforcement officers, the Supreme Court recently ruled in a non-RTKL case that there was no constitutional privacy protection for home addresses. The court noted that "we take judicial notice of the fact that Pennsylvania counties vary in size from approximately 130 square miles to approximately 1,230 square miles, with population in those counties ranging from 5,010 to 1,536,471. Given these facts, we do not consider the disclosure of a Commonwealth employee's county of residence 'tantamount to production' of the employee's home address, 'or that disclosure of the county is highly likely to cause the very harm the exemption is designed to prevent.'" (*Governor's Office of Administration v. Pennsylvanians for Union Reform*, No. 498 C.D. 2014, Pennsylvania Commonwealth Court, Nov. 20)

The Federal Courts…

After noting that pro se litigant Zeyad Abdeljabbar failed to respond to summary judgment motions filed by the Bureau of Alcohol, Tobacco and Firearms, the FBI, and EOUSA, Judge Reggie Walton has reviewed and accepted the agencies' claims. In so doing, he pointedly criticized a recent decision by Judge Rudolph Contreras finding that the Consolidated and Further Continuing Appropriation Act of 2012, containing a provision prohibiting ATF from processing FOIA requests pertaining to gun trace data, no longer qualified under **Exemption 3 (other statutes)** because the 2012 Continuing Appropriation Act did not identify the provision as an Exemption 3 statute as required by the OPEN FOIA Act of 2009. Walton first explained that versions of the prohibition against using agency resources to process requests for gun trace data have existed in the relevant congressional appropriations since at least 2005 and that a number of courts have found the provision qualified under Exemption 3. However, in *Fowlkes v. ATF*, 2014 WL 4536906 (D.D.C. Sept. 15, 2014), Contreras concluded that since the 2012 appropriations act did not cite FOIA as required by the 2009 OPEN FOIA Act, it could not qualify as an Exemption 3 statute. Walton observed that Contreras relied on a case from the Eastern District of Michigan, *Smith v. ATF*, WL 3565634 (ED. Mich., July 18, 2014), in which the court indicated that the 2012 appropriations act did not appear to satisfy the requirements of OPEN FOIA Act. But, Walton pointed out, the court in *Smith* concluded the 2008 Appropriations Act, which did qualify as an Exemption 3 statute because it predated the OPEN FOIA Act, provided a complete prohibition of the use of future funds to process FOIA requests for gun trace data. Walton then noted that "the disclosure prohibitions set forth by Congress in 2005 and 2008 appropriations bills are still effective prospectively and beyond those fiscal years as a permanent prohibition, until such time as Congress expresses the intent to repeal or modify them." He added that "Congress's decision to incorporate similar language into appropriations bills after 2009 demonstrates its intent to continue the disclosure prohibition; to find otherwise would require this Court to reach the implausible conclusion that Congress intended to repeal by implication a disclosure prohibition, at least with respect to FOIA, by reiterating that very prohibition in subsequent legislation." (*Zeyad Abdeljabbar v. Bureau of Alcohol, Tobacco and Firearms, et al.*, Civil Action No. 13-0330 (RBW), U.S, District Court for the District of Columbia, Nov. 20)

A federal court in California has ruled that the Defense Department failed to provide sufficient justification under **Exemption 4 (confidential business information)** to withhold a comprehensive subcontracting plan submitted by Sikorsky Aircraft Corporation required to be submitted to DOD under a 1990 amendment to the Small Business Act. After the agency failed to respond within the statutory deadline, the American Small Business League filed suit. Judge William Alsup ordered the agency to provide Sikorsky's report for *in camera* review. Rather than provide an unredacted copy with those portions of the report the agency contended were exempt, DOD provided both an unredacted version and a redacted version, accompanied by an affidavit from Sikorsky explaining why disclosure would cause competitive harm. Finding the agency's filings insufficient, Alsup noted that "having reviewed Sikorsky's lodged Comprehensive Subcontracting Plan and [the company's] accompanying declaration, this order finds that the agency has not provided reasonably specific detail to explain why the redacted portions of the lodged document are exempt under Section 55s(b)(4)." Pointing out that Sikorsky's declaration was couched in terms like *would* and *could*, Alsup indicated that "that is not enough to grant summary judgment for the agency." The agency also suggested that handwritten signatures and personally-identifying information about Sikorsky employees in their work capacity were protected by **Exemption 6 (invasion of privacy)**. Rejecting the claim, Alsup noted that "the work contact information for several Sikorsky employees listed in the Comprehensive Subcontracting Plan is already accessible online." (*American Small Business League v. Department of Defense*, Civil Action No. 14-02166 WHA, U.S. District Court for the Northern District of California, Nov. 23)

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A federal court in California has ruled that EFF is entitled to $7,936 in **attorney's fees** for its suit against Homeland Security for information about the use of drones to patrol the border. Although Judge Phyllis Hamilton found that Customs & Border Protection had properly withheld most of the disputed records, she noted that the agency's failure to notify EFF of it backlog served as a catalyst to EFF's suit. She pointed out that "while defendant is correct that it never expressly refused to produce records, its lack of response for nearly four months certainly suggested that EFF needed to take further action to trigger a response." Having found EFF was eligible for attorney's fees, Hamilton indicated that "while the court does not agree that EFF 'substantially prevailed' on its summary judgment motion, as it obtained only very limited relief, that result relates more to the reasonableness of the fees requested. The lawsuit's initial effect on spurring defendant to produce documents is sufficient to establish that plaintiff 'substantially prevailed' on its first cause of action for the wrongful withholding of records." However, Hamilton found that EFF had not substantially prevailed on its request for a fee waiver. She explained that a proposed order between the parties granting a fee waiver was not sufficient because "the order simply reflects the parties own agreement (i.e., defendant's voluntary change in position), which does not constitute 'obtaining relief through a judicial order.'" Turning to consideration of the amount of fees to which EFF was entitled, Hamilton pointed out that "because defendant's initial withholdings lacked a reasonable basis in law, the court does find that plaintiff has demonstrated entitlement to at least some measure of fees." Reducing EFF's fee award request to those costs associated with filing the complaint, Hamilton observed that "the vast majority of the relief obtained by plaintiff came in response to the filing of the complaint itself, and was unrelated to the subsequent proceedings." (*Electronic Frontier Foundation v. Department of Homeland Security*, Civil Action No. 12-5580 PJH, U.S. District Court for the Northern District of California, Nov. 18)

Editor's Note: This is the last issue of *Access Reports* for 2014. The newsletter will take a break for the holidays. The first issue of 2015 will be dated Jan. 7, 2015, v. 41, n. 1.