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Washington Focus: Attorney General Eric Holder announced Feb. 21 new guidelines limiting the circumstances under which the Justice Department will seek journalists' phone and email records as part of a leak investigation. According to the New York Times, the guidelines establish a presumption that DOJ will provide advance notice to the media before trying to obtain communications records. The guidelines also forbid search warrants for journalists' working materials unless the reporter is a criminal suspect. The ability of journalists to keep sources confidential has been under attack on a number of levels in recent years. Several high-profile cases brought by individuals who were suspected of wrongdoing were brought under the Privacy Act as a way of discovering the identities of government leakers by subpoenaing reporters' phone and email records.

House Passes FOIA Amendments

The House of Representatives unanimously passed a substantive FOIA bill, the "FOIA Oversight and Implementation Act of 2014" (H.R. 1211) on Feb. 25. The bill sponsored by Rep. Darrell Issa (R-CA), Rep. Elijah Cummings (D-MD), and Rep. Mike Quigley (D-IL), now goes to the Senate for consideration. While the Senate has not been working on similar legislation, the fact that the House bill had strong bipartisan support suggests the Democratically-controlled Senate may take the House bill seriously. Whether the Senate moves quickly on the bill or not, the bill makes some rather interesting changes which if adopted could have a far-reaching impact on how FOIA is implemented.

From the perspective of agencies, a primary focus of the new bill is various new reporting requirements, including expanded roles for the Office of Government Information Services and the addition of a role for agency inspector generals to periodically oversee agency FOIA performance. The legislation also requires agencies to update their FOIA regulations, a requirement that up until now the Justice

Department's Office of Information Policy has contended is optional.

Perhaps the most dramatic change is somewhat unexpected—the insertion of a foreseeable harm test applicable to all the exemptions rather than just those like Exemption 5 (privileges) that are largely focused on discretionary institutional interests. The House bill inserts language before the "any reasonably segregable portion" provision requiring that "an agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law." Currently, the foreseeable harm test, contained in the Holder Memo, is only discretionary and non-binding on the agency. As a result, it has been an unmitigated disappointment to the requester community since agencies are only encouraged to make discretionary disclosures and are not penalized in any way if they decide not to even consider them. However, by making agency consideration of the foreseeable harm in disclosure a statutory requirement, agencies will face judicial review of such decisions and will need to be able to justify those decisions. How this will play out with exemptions that do not appear to be discretionary on their face remains to be seen. Nevertheless, the application of most exemptions is considerably more flexible and open to interpretation than agencies typically admit.

Another striking and unexpected change is the addition of added rights for requesters whose requests are denied. Someone receiving an adverse determination of their request now has the right to "seek assistance from the agency FOIA Public Liaison," an extension of the time in which to file an administrative appeal to not less than 90 days, and the inclusion of the right to "seek dispute resolution services from the FOIA Public Liaison or the Office of Government Information Services." Another procedural change that reflects continued congressional disdain for fees would require agencies to provide written notice to a requester justifying the assessment of fees if the agency had failed to comply with a time limit that would typically prevent the agency from assessing fees. If the required written notice is not sent, the agency may not assess fees.

The legislation codifies the development of an online portal for making and tracking requests and filing appeals. OMB will be charged with ensuring "the existence and operation of a single website, accessible by the public at no cost to access." This will involve a three-year pilot program to assess the "benefits of a centralized portal to process requests and release information under [FOIA]." The project will require the participation of three agencies that have not previously participated in a centralized portal, like the current FOIA Online project being run by EPA, Commerce, and NARA. Agencies selected for the pilot program must include one agency that receives more than 30,000 requests annually, one agency that receives between 15,000 and 30,000 requests annually, and one agency that receives 15,000 or fewer requests annually. The three agencies will use a central portal to receive requests, consult with and refer requests to participating agencies, process FOIA requests, track the status of FOIA requests, and make records released publicly available through the central portal. OMB, OGIS, DOJ, and the head of each agency in the pilot program shall review the benefits of a centralized portal, including cost and resource savings, efficiencies gained, changes in the number of requests, increases in transparency, and changes in the ability to access and compile information required for annual reports. Three months after completion of the pilot program, the head of each participating agency shall report to Congress on the program's impact on agency FOIA implementation and whether the agency intends to continue to participate in the centralized portal.

Inspector generals are given a statutory role in FOIA oversight for the first time. Under the bill, agency IGs are required to periodically review agency compliance with FOIA, including timely processing of requests, assessment of fees and fee waivers, and the use of exemptions. The IGs are then required to report recommendations to the head of the agency, including recommendations for disciplinary action. The bill notes

that "the withholding of information in a manner inconsistent with the requirements of [FOIA], as determined by the appropriate supervisor, shall be a basis for disciplinary action. . ."

To maximize the disclosure of information in the public interest, the bill requires agencies to review their records to determine "whether the release of the records would be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government." Any such records are to be reasonably segregated and redacted as necessary and then made available electronically. Agencies are also required to maximize their use of technology to make information public to "inform the public of the operations and activities of the Government" and to "ensure timely disclosure of information." Agencies are to identify categories of records that can be disclosed regularly as well as "additional records of interest to the public that are appropriate for public disclosure." No later than a year after enactment, agencies are required to report to OIP and the jurisdictional congressional committees categories of records that would be appropriate for proactive disclosure.

Agencies will be required to provide more data in their annual reports, including referrals to OGIS. Those reports will be sent to OGIS as well as the Attorney General. Agencies will also need to make the statistical data used to compile their annual reports publicly available in electronic format.

It is unlikely that the Senate will take up the House bill immediately. But the House bill contains an interesting and useful mix of amendments that should certainly provide a good starting point for any future Senate consideration.

Views from the States…

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

North Carolina

A court of appeals has ruled that the Automated Criminal/Infraction System database is a public record under the custodianship of the North Carolina Administrative Office of the Courts and must be disclosed to Lexis. Lexis had submitted requests for the database to the Administrative Office of the Courts and to the Wake County Court Clerk. The database is a contemporaneous compilation of records submitted by county court clerks. Although county court clerks have the ability to access their own records, they do not have the ability to make copies of the entire database. As a result, the Wake County Court Clerk told Lexis she did not have custody of the database. The AOC in turn, argued that it did not have custody of the database because the information in the database was created and compiled by the various county court clerks. The defendants also argued that a statutory provision allowing vendors to offer access to database records for a fee conflicted with the availability of the database under the Public Records Act. The trial court agreed with the government and Lexis appealed. The appeals court reversed, noting that "we agree with Lexis's assertion that, once the clerks of court enter information from their criminal records into ACIS, the database becomes a new public record 'existing distinctly and separately from' the individual criminal records from which it is created. The plain language of the Act includes 'electronic data-processing records' in its definition of public records." While the appeals court agreed with AOC that it was not the custodian of the information in the database, it found that assertion irrelevant. The court pointed out that "the Act does not refer to custodians of *information* but of *records*. The plain language of the Act requires custodians to provide copies of their public *records* and

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nothing in the Act suggests that this requirement is obviated because the *information* contained in a public record is publicly available from some other source." The court observed that "here, the AOC has admitted that it created, maintains, and controls ACIS and is the only entity with the ability to copy the database. Thus, ACIS is not the public record of another agency. Rather, ACIS is a record *of the AOC* and *in the AOC's custody*." Addressing the distinction between the counties' records and those in the ACIS, the court noted that "the clerks of court have not simply made copies of their records and sent them to the AOC. Rather, the clerks have acted at the direction of the AOC to create an entirely new and distinct public record, to wit, ACIS." Expressing sympathy with the government's concern about the effect of public access on vendor sales, the court nevertheless noted that method of access was discretionary, not mandatory. The court indicated that "if provision of copies of ACIS under the Act renders the option of providing remote electronic access unnecessary or not cost-effective, the AOC can simply decline to offer this additional method of access." (*LexisNexis Risk Data Management, Inc. v. North Carolina Administrative Office of the Courts*, No. COA13-547, North Carolina Court of Appeals, Feb. 18)

Pennsylvania

A court of appeals has ruled that payments made by the Department of Public Welfare to contractors responsible for running the state's Medicaid program constitute financial information and are not protected under the trade secrets provision of the Right to Know Law. The court also found that payments made directly by managed care organizations to subcontractors were protected by the state's Trade Secrets Act because disclosure could cause substantial competitive harm. James Eiseman and the Public Interest Law Center of Philadelphia made a broad request to the Department of Public Welfare for records concerning rates paid for various Medicaid services. Contractors intervened and the complaint was heard by the Office of Open Records. OOR concluded that the information qualified as financial records of government transactions that were presumptively public with limited exceptions. Although the contractors claimed the records qualified as trade secrets, because the financial records exceptions did not include trade secrets, OOR found the exemption did not apply. While the court agreed that records of payments made by the agency under the contracts with MCOs were financial records, it found that OOR had erred in concluding that because trade secrets was not included in the RTKL as an exception to the financial records disclosure requirement it was not a viable basis for non-disclosure. Instead, the court pointed out that the state Trade Secrets Act provided an independent basis for withholding the records. The court then decided the agency had not shown that disclosure of its payments to MCOs would cause substantial competitive harm, but that because the MCOs faced actual competition in the marketplace, their payments to subcontractors were protected. The court noted that "relevant to this inquiry is that DPW does not have competitors in this market; DPW is the Commonwealth agency charged with administering the Medicaid program in Pennsylvania, and is in no danger of losing market share to competitors." As to the MCOs, the court explained that "the actual competition in the relevant market among the five MCOs is apparent. . .As the MCOs compete for market share, gain for one means loss for another." The court observed that "the importance of the MCO Rates to each MCO's business model, and continued financial vitality in the industry, weighs in favor of holding the information constitutes confidential proprietary information and trade secrets." (*Department of Public Welfare v. James Eiseman, Jr.*, No. 1935 C.D. 2012, Pennsylvania Commonwealth Court, Feb. 19)

In a companion case dealing with a suit brought by providers of dental services, a court of appeals has ruled that payments made to providers by Medicaid dental subcontractors are not public records because they are not in the constructive possession of the Department of Public Welfare. James Eiseman and the Public Interest Law Center of Philadelphia made a broad request to the Department of Public Welfare for records concerning rates paid for various Medicaid services. Contractors and subcontractors intervened in the proceedings before the Office of Open Records, which found that the subcontractor records were in the constructive possession of the agency because the contract provided access for oversight purposes. The OOR

relied on *Lukes v. Dept of Public Welfare*, 976 A.2d 609 (Penn 2009), finding that because the information related to the contract the agency retained constructive possession of the records. The court, however, noted that *Lukes*, which involved an interpretation of the previous version of the Right to Know Law, had been overturned precisely because the current version of the RTKL required a more specific connection than mere contractual ability to access records. Here, the court found the providers did not have a contract with the agency and that the records did not relate directly to the performance of the contract. The court observed that "under the only relevant contract involving a government agency, between DPW and a [Managed Care Organization], there is no direct relationship between the services the MCOs perform for DPW and the downstream Provider Rates [paid by MCOs to providers]. This is because case law addressing the 'directly relates' prong evaluates performance of the services, not the price to acquire the services." One judge dissented, noting that the contracts for Medicaid services required contractors to negotiate rates with providers and thus "directly relate to the Subcontractors' performance of a government function." (*Dental Benefits Providers, Inc., et. al, v. James Eiseman, Jr.*, No. 945 C.D. 2013, Pennsylvania Commonwealth Court, Feb. 19)

Based on recent precedent, a court of appeals has ruled that government-issued phone numbers and email addresses fall under the personal privacy exemption because they are unique identifiers for individual employees. Robert Clofine requested the phone number and email address for employees at the Adams County Assistance Office. The Office refused to furnish the phone numbers and email addresses and Clofine appealed to the Office of Open Records, which ruled against the County based on its interpretation that government-issued phone numbers or email addresses did not fall within the scope of the personal privacy exemption. But the court, citing the recent decision in *Office of Lieutenant Governor v. Mohn*, 67 A.3d 123 (Penn 2013), reversed. The court noted that in *Mohn* the appeals court had found that such information did fall within the privacy exemption. Applying the holding in *Mohn* to this case, the court pointed out that the phone numbers and email addresses constituted "information that is unique to a particular individual," "information which may be used to identify an individual from the general population" or "information not shared in common with others that makes the individual distinguishable from another." The court observed that "regardless of whether the agency-issued email address or phone numbers in question are used to conduct agency business, they are still personal to each Adams County Assistance Office income maintenance caseworker." (*Department of Public Welfare v. Robert Clofine*, No. 706 C.D. 2013, Pennsylvania Commonwealth Court, Feb. 20)

The Federal Courts…

After insisting on invoking a *Glomar* response to neither confirm nor deny the identity of an agency informant during seven years of litigation, Judge Gladys Kessler has ruled that the DEA must process Carlos Marino's request for records pertaining to Jose Everth Lopez because he was identified as a government informant at several related trials. Marino had been convicted of being the Miami money man for a drug operation run by Colombian Pastor Parafan-Homen, based largely on Lopez's testimony. Lopez subsequently testified at Parafan-Homen's trial that he had lied multiple times during Marino's trial, and that while he had claimed at Marino's trial to be a low-level participant in Parafan-Homen's operation, he actually had met Parafan-Homen on several occasions at meetings of high-level conspirators in Bogota. Marino made a FOIA request for records indexed under Lopez's DEA informant file. The agency denied Marino's request, claiming it could neither confirm nor deny that it had records pertaining to the informant file. Judge Ricardo Urbina, the original judge assigned to Marino's case, upheld the government's position. However, the D.C. Circuit reversed, noting that by arguing that Lopez's informant status had been publicly confirmed, Marino had raised

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a defense to the *Glomar* response. Marino subsequently died of cancer and his ex-wife was substituted as plaintiff in his place. The case was reassigned to Kessler and she noted that, after some equivocation, the DEA conceded that Lopez's status as an informant was a matter of public record and withdrew its *Glomar* response. Instead, the agency took the position that it had responded to Marino's request by producing a single document and that, to the extent that Marino's request was broader, all records were protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. The agency argued that Marino's request was limited to documents in Lopez's informant file that were made public at the trials of Marino and Parafan-Homen, and documents indexed to the informant number that were "required to be made public" at the trials, but were not. Marino argued his request was for all records indexed under the informant number. Kessler agreed. She noted that in the third sentence of his request, Marino asked for "*any* documents indexed under NADDIS No. 3049901 [and that the agency] send Marino any segregable portion of such documents. This expansive language is fully consistent with Marino's interpretation and inconsistent with the narrow reading urged by the Government." Kessler indicated the agency still was arguing that it was entitled to categorical protection under Exemption 7(C). But she noted that to prevail the agency had to show that it conducted a good faith effort to find responsive records and that those records fell within the exemption. DEA contended it could not search for responsive records on Lopez's role as an informant at trial because its records were not searchable by case name or court file number. Rejecting that argument, Kessler observed that "this explanation is totally unconvincing in light of the Court's ruling that Marino seeks all documents indexed to NADDIS number 3049901, and not simply those that were made public or required to be made public at the two trials." Kessler found the privacy interest in Lopez's records was diminished by the agency's performance. She pointed out that "even if the Government did not definitively know that Lopez was perjuring himself at Marino's trial, its failure to investigate and learn all of the facts about its key witness, and to disclose exculpatory evidence to Carlos Marino, reasonably suggest that it 'might' have acted negligently or otherwise improperly during Marino's prosecution." Kessler dismissed the agency's categorical protection claim. She noted that "while it is both reasonable and consistent with this Circuit's case law to assume that some portion of the responsive records may implicate the privacy interests of Lopez and others who may be mentioned in them this does not supply a basis to withhold the records in their entirety. The DEA puts forth no reason why redactions or selective withholding will not suffice to protect any existing privacy interests." (*Griselle Marino v. Drug Enforcement Administration*, Civil Action No. 06-1255 (GK), U.S. District Court for the District of Columbia, Feb. 19)

Judge Beryl Howell has ruled that Michael Lauer, who was ordered to pay the SEC $62 million in disgorgement and civil penalties for overstating and manipulating the value of his hedge funds, is eligible for **attorney's fees** as a result of FOIA litigation brought by his attorney, David Dorsen, but that he is not entitled to fees because of his private interest in the records released. Dorsen, who represented Lauer in his Eleventh Circuit appeal of the SEC order, requested records from the SEC showing when the agency authorized a formal investigation of Lauer and the filing of a civil complaint against him. The agency responded that the records were protected under **Exemption 5 (privileges**). Dorsen then filed an appeal and agreed to accept only the date and the Commissioners' collective vote. He then filed suit and the agency disclosed five pages of three responsive documents. Dorsen told the court the merits had been resolved and then filed a motion for attorney's fees, arguing that the agency's disclosure of the records made him the prevailing party. At the outset, Howell indicated that "although Lauer's attorney made the underlying FOIA request, is named as the plaintiff in the complaint, and filed the pending motion for attorney's fees, these actions were taken on behalf of Lauer. Indeed, if this motion were successful, any attorneys' fees would be awarded to Lauer, not to the plaintiff." The agency argued that Lauer was not the prevailing party because the agency might well have disclosed the records based on Dorsen's narrowed administrative appeal. Howell rejected the claim, noting that "this prediction about the plaintiff's potential success on administrative appeal implicitly suggests that the released records were not properly subject to withholding under Exemption 5. The defendant cannot

simultaneously argue that the documents would have been released in response to the plaintiff's appeal, *and* assert that the records were exempt from disclosure and, thus, were reasonably withheld." She found that "the lawsuit did, in fact, prompt a speedier release of responsive records before resolution of the appeal, as amply confirmed by the timing of the released shortly after the initiation of this lawsuit." Howell then found that the public interest in the documents was slight. She pointed out that "the public knowledge gained by learning the date and result of SEC Commissioners' votes to investigate and sue Lauer is not a matter of significant or widespread public concern. . .and is primarily relevant to Lauer in his attempt to vacate the civil judgment against him." But she pointed out that "although scrutiny of this agency activity through FOIA requests by individual targets may, therefore, fall short of the general public benefit factor, some value attaches to the disclosure of the SEC's discrete decisions by shedding light on this enforcement activity and, in the aggregate, such information may provide significant public benefit." Howell found Lauer clearly had a personal interest in the request, noting that "the plaintiff concedes that his aim was to use the FOIA request to develop his arguments in support of his efforts to vacate the civil judgment against Lauer. The plaintiff's stated motives are primarily commercial and personal interests, thus this factor weighs against an award of attorneys' fees." She concluded the agency did have a reasonable basis in law for withholding the records. She pointed out that "the defendant has established a colorable basis in law for denying the plaintiff's FOIA request under the belief that Exemption 5 applied since the requested records contain 'attorney-client communications from Staff to the Commission' and include details of internal meetings and deliberations." (*David M. Dorsen v. United States Securities and Exchange Commission*, Civil Action No. 13-00288 (BAH), U.S. District Court for the District of Columbia, Feb. 14)

A judge in Michigan has ruled that the FBI failed to conduct an **adequate search** for records concerning the investigation and determination to identify the "Juggalos" as a gang, but that it properly withheld records under a variety of exemptions. The law firm Hertz Schram made a multi-part request concerning the gang. In response, the FBI located 63 pages and released 62 pages with redactions. The agency subsequently found another 93 pages, disclosing 40 pages. At about the same time, the FBI received a request from MuckRock.com for records concerning the Insane Clown Posse, noting that they were also referred to as the Juggalos. The FBI released 121 pages in response to MuckRock's request. Hertz Schram argued that because MuckRock received more records pertaining to essentially the same topic the agency's search was inadequate. The court disagreed, noting that "even if the extra documents submitted in response to the MuckRock request would have been responsive to Plaintiff's request as well, the mere fact that additional responsive documents exist that were not disclosed does not, without more, indicate that the FOIA search was inadequate." Nevertheless, the court found the agency's search was inadequate. After a search of the central records system, the court observed, the FOIA office properly concluded that the National Gang Intelligence Center was the only office likely to have responsive records. But the court noted that "the declaration of the NGIC's search for records is insufficient. . .The declaration does not describe how the NGIC organized or searched its files, nor does the declaration provide information regarding 'the procedures the NGIC used to process the request and to ensure that it appropriately responded to the request." Further, the NGIC misinterpreted the request as limited to the records relied upon to classify the Juggalos as a gang. The court pointed out that "the language of the request encompasses not only documents relating to the decision to classify the Juggalos as a gang, but also, more generally, the investigation of the Juggalos for suspected gang activity in preparation for the report." The court agreed that the agency had improperly narrowed the scope of the request by ending its search at 2011 when the NGIC report was issued, rather than in 2012, the date of the request. The court indicated that "Plaintiff's FOIA request expressly sought records 'regarding' two underlying events—the investigation and determination to classify the Juggalos as a gang in the 2011 report—and the request expressly encompassed records relating to, but dating after, the report. Because Plaintiff's request sought records 'from 2007 to the present,' the appropriate temporal scope of the FBI's request would

have been 2007 to the start date of the FBI's search." The court found that information from law enforcement agencies to the NGIC was protected by **Exemption 5 (privileges)**. The court explained that "the intra-agency notes reflected the thoughts of the FBI analyst, and the law enforcement memos were prepared in consultation with the FBI on the subject of gang reports, detailed gang intelligence, and reports of gang-related criminal activity." The court also agreed that information from law enforcement sources was protected by **Exemption 7(D) (confidential sources)**. The FBI argued that "these law enforcement agencies did not intend or expect that this cooperative exchange of detailed and singular law enforcement information and intelligence, which was provided to the FBI solely for purposes of furthering NGIC's research, would be publicly disclosed by the FBI." The court accepted the agency's argument, noting that "the nature of the investigation—ongoing research into the possibly gang-related criminal activities of members of an organization—supports a conclusion that the state and local law enforcement agencies submitted the bulletins, identification forms, and police report under an implied assurance of confidentiality." (*Hertz Schram PC v. Federal Bureau of Investigation*, Civil Action No. 12-14234, U.S. District Court for the Eastern District of Michigan, Feb. 25)

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