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Washington Focus: Sen. Richard Burr (R-NC), the new chair of the Senate Intelligence Committee, has sent a letter to President Barack Obama requesting that the executive branch return all copies of the recently released Senate Intelligence Committee report on the CIA's use of torture in interrogating terrorism suspects after 9/11. The alleged reason for Burr's request was to ensure that the report would not be subject to disclosure under FOIA. However, because the report is a congressional record it probably isn't subject to FOIA in the first place. But that may not be enough to solve the dissemination problem since the report clearly is based on CIA documents, including an internal agency study of its interrogation program known as the Panetta Review, which are agency records. Because those records are classified and are likely to remain so there is little chance that they will be disclosed under FOIA either. Both the ACLU and journalist Jason Leopold have pending suits requesting a less-redacted version of the report and Panetta Review. Leopold noted that the government recently filed a declaration in the ACLU case in which it contended the report was a congressional record and cited Burr's letter to support its case.

Court Finds Shortcomings In Requester's Appeal

Dealing with a case in which the plaintiff's claims were substantially less than clear, Judge John Bates has ruled that Hall & Associates failed to exhaust its administrative remedies as to one claim and failed to state a claim for relief for two others. In so doing, Bates has affirmed that the administrative appeals process favors agencies in ways that are not apparent in the text of FOIA. While his interpretation is probably reasonable, it allows agencies to short circuit plaintiffs' judicial challenges in large part because their administrative appeals are poorly presented or do not detail every issue that they might have been able to dispute. Further, because judicial review under FOIA is specifically *de novo*, meaning the court is to hear the issues as if for the first time and there is no presumption favoring the agency, providing agencies with procedural advantages because of the appeals process results in creating further obstacles preventing plaintiffs from getting

judicial review of their disputes.

Because the case has its own peculiarities, it is not the most representative example of how the administrative process would normally play out. Hall & Associates represented the Iowa League of Cities in litigation against the EPA challenging application of two regulatory requirements as applied to water treatment processes at municipally owned sewer systems. The Iowa League of Cities argued EPA's regulations were invalid because the agency did not have the statutory authority to impose them or because they were adopted in violation of the Administrative Procedure Act. The League prevailed at the Eighth Circuit, but it was unclear whether its decision was limited geographically or would be applied nationwide. To learn more about that decision, Hall & Associates made a FOIA request to EPA for records about the agency's position. After narrowing the categories of records requested and limiting the search to EPA Headquarters, the EPA estimated the search would cost $1,073, a total Hall disputed but nevertheless agreed to pay. In an interim response, the EPA released six documents and withheld 21. In a subsequent response, the agency identified an additional 49 documents it was withholding under Exemption 5 (privileges) and stated that the total bill would be $1,015. Hall filed an administrative appeal, arguing that the records were not responsive and that the bill, which Hall vowed it would not pay, was "inappropriate and excessive." The EPA denied Hall's appeal indicating that "nowhere in your letter of appeal, do you mention or challenge the FOIA exemptions which were the basis for the withholding of documents and portions of documents. Nor do you raise concerns regarding the sufficiency of the search conducted in order to provide documents to you." EPA did reduce the fee further to $903. Hall then filed suit, claiming the agency had failed to support its exemption claims, failed to respond fully and completely to its request, and charged an excessive and inappropriate fee.

Bates first dispensed with Hall's claim that the agency had improperly applied exemptions and had failed to disclose segregable portions of records. Reviewing Hall's original appeal letter to the agency, Bates pointed out that "nowhere in the letter does Hall specifically challenge EPA's decision to withhold any document; and more to the point, nowhere in the letter does Hall complain about the 'basis and rationale' for EPA's decision to withhold. Hall's withholding claim is therefore an unexhausted one, and it must fall by the wayside." Hall argued its appeal letter contained two sentences highlighting that the agency's withholding decisions were inappropriate. But, as Bates indicated, both sentences were prefatory to Hall's complaint about the fees it was being charged. Bates observed that Hall "failed to raise any specific complaint regarding EPA's withholding behavior, it did not put the Agency on notice of its looming withholding claim, and it therefore deprived EPA —and this court—of the benefits of exhaustion"—allowing the agency to review its decision and correct any mistakes.

Hall argued that "EPA's FOIA regulations did not require the firm to explicitly raise a withholding challenge in order to administratively exhaust that claim. As Hall reads things, so long as the firm appealed *some* aspect of EPA's FOIA response, it necessarily appealed *all* aspects of EPA's response. But that is wrong. . ." Instead, Bates observed that "Hall was obligated to do more than just generally appeal EPA's final response letter. The firm, instead, was required to clearly and specifically appeal *each* adverse determination within the response letter that it disagreed with and sought review of—including EPA's determination 'to withhold requested records.' It failed to do so here; hence, this claim is unexhausted." Bates pointed out that even if EPA's regulations were ambiguous, "this Court has no license to upset EPA's preferred reading. . .And here, EPA's interpretation is more than just a reasonable one; it is the best one, given the text."

After throwing the first claim out, Bates dismissed Hall's other two claims as well. Those claims—that the agency failed to produce responsive records and overcharged for its search—satisfied the exhaustion requirement. However, Bates found neither stated a claim for relief that could be granted. Bates noted that complaining about the records received did not constitute a challenge to the adequacy of the agency's search and observed that "mere frustration with the outcome of a search [does not] entitle a FOIA requester to relief."

Indeed, Bates pointed out that in its complaint Hall claimed EPA had found responsive records but decided to withhold them. Bates explained that "taking these factual allegations as true—that EPA's search *did* uncover responsive documents, which the Agency chose to withhold—renders Hall's no-responsive documents claim 'implausible on its face.'" Bates noted that Hall's admission that the EPA had located responsive records "sinks the firm's excessive-and-inappropriate fee claim. . .Hall. . .admits that the Agency's search actually *did* produce responsive documents. And Hall has not offered any alternative factual allegation to support its excessive-fee claim. Without more, the Court is left with Hall's bare assertion that EPA's fee is somehow excessive or inappropriate. This is not enough to avoid dismissal." (*Hall & Associates v. U.S. Environmental Protection Agency*, Civil Action No. 14-808 (JDB), U.S. District Court for the District of Columbia, Dec. 31, 2014)

Editor's Note: The text of FOIA says only that agencies are required to provide a right to appeal to the head of the agency any adverse determination. The agency has 20 working days to resolve the appeal and if the appeal is upheld in whole or in part, the agency must inform the requester of his or her right to file a complaint in district court where "the court shall determine the matter de novo" and the "burden is on the agency to sustain its action." If an agency misses the 20-day deadline for responding to an appeal, the requester has the right to proceed to court immediately. Administrative appeals are designed to benefit requesters by providing a right to have the agency's initial decision reviewed anew by someone higher up in the agency who may be more familiar with FOIA case law. The statute requires nothing more from a requester than to tell the agency that he or she disagrees with their decision. While such a bare-bones appeal probably will not persuade the agency, the idea that requesters are required to present detailed and sophisticated arguments at the appeals level in order to preserve their right to judicial review is not only contrary to the concept of de novo review, where the burden is on the agency not the requester, but is also belied by the inclusion in the 1986 amendments of a requirement that judicial review of fee-related disputes be limited to the administrative record. In other words, Congress singled out fee issues as being distinctly different than other issues, underscoring that for all other disputes de novo review was the standard. Further, the D.C. Circuit's decision in *Oglesby v. Dept of Army* recognized that a no records response was a denial that could be challenged in court. If a no records response with nothing more implicates the adequacy of a search, surely a complaint that the records the agency released were not responsive also implicates the adequacy of the search, regardless of whether the agency did find some other responsive records that it withheld. In this case, one would expect a law firm to do a better job than the average requester, but to penalize a requester's ability to obtain judicial review because their administrative appeal was judged wanting is not appropriate. Unfortunately, Bates' decision falls along a spectrum of jurisdictional interpretations that have made this outcome the norm rather than the exception.

Views from the States…

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

Connecticut

A closely divided supreme court has ruled that arbitration panels set up under the Teacher Negotiation Act are not subunits of the Department of Education and therefore are not public bodies subject to the open meetings provisions of FOIA. The Torrington City Council rejected a negotiated agreement between the Torrington Board of Education and the Torrington Education Association. As required by the TNA, the

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dispute went to arbitration. A three-member panel was appointed. One arbitrator was appointed by the board and one by the association. Those two arbitrators then selected a third impartial arbitrator. When reporter Jim Moore tried to attend the arbitration proceeding, the panel went into executive session. Moore filed a complaint with the FOI Commission, which ruled that because the list of qualified arbitrators was maintained by the Department of Education the arbitrators were a subunit of the department. The arbitrators contended they were not part of the department and a supreme court majority agreed. The majority pointed out that "the arbitration panel does not just have a great deal of autonomy, it has complete autonomy," adding that "aside from having their name on the list, the arbitrators have no association whatsoever with the department." The majority pointed out that "the only physical presence connected with the department is the list of arbitration panel members. This list is maintained by the department and is located in the department. We conclude, therefore, that the panel members are not in the department." The majority indicated that "arbitrators function in an autonomous fashion. As the foregoing demonstrates, the arbitration panel was not created by the government. A reasonable interpretation of the [statutory provision] therefore, cannot support a determination that the commissioner 'oversees' the arbitration process." The dissenting justices noted that when faced with an acknowledged ambiguity in the statute, the majority had adopted an interpretation that discouraged, rather than encouraged, public oversight of government decisions. (*Martin A. Gould v. Freedom of Information Commission*, No. 18966, Connecticut Supreme Court, Dec. 16, 2014)

Florida

A court of appeals has ruled that the trial court erred when it dismissed a suit filed by Consumer Rights against Bradford County for its failure to produce records providing email addresses for all county employees who had county-issued email addresses. In its request, Consumer Rights specifically indicated that it was not demanding the county create a specific list, but that it was seeking a grouping of records that would include all county employee email addresses. After the county failed to respond or even acknowledge Consumer Rights' request, the group filed suit two and a half months later. The county then provided a list created specifically to respond to Consumer Rights' request and contended that no such list existed until that time. The trial court agreed and dismissed the suit. The appeals court, however, found there was a material dispute over whether the county had violated the Public Records Act by failing to respond within the statutory time limits. Remanding the case to the trial court for further proceedings, the appeals court pointed out that "the County's delay in responding to Consumer Rights' record request was unjustified unless the delay was excused under the [Public Records Act]." (*Consumer Rights, LLC v. Bradford County*, No. 1D14-2049, Florida District Court of Appeal, First District, Dec. 17, 2014)

Louisiana

While ruling that the resumes of applicants for the position of President/Chancellor of LSU were public records and were required to be released by the university, a court of appeals has severely cut back on the trial court's conclusion as to who qualified as an applicant under the Public Records Act. The appeals court also found LSU should not have been sanctioned for contempt for refusing to disclose records while the case was on appeal and that the trial court improperly increased the hourly rate for attorneys representing various newspapers. LSU hired William Funk & Associates to oversee the hiring of a new president in 2012. Funk put together a spreadsheet containing 100 individuals who had expressed some interest in the job. He winnowed these down to 35, but the university only interviewed three candidates before making a decision. When Capital City Press and the New Orleans *Times-Picayune* filed suit against LSU to provide records on the applicants, the trial court ruled that the pool of applicants consisted of the 35 who had expressed further interest, ordered LSU to disclose their resumes immediately, awarded the plaintiffs' attorney's fees and penalized LSU for being in contempt. The PRA had been amended in 2006 to require disclosure of the names and qualifications for applicants to positions of authority or with policymaking duties. The appeals court

pointed out that "the term 'applicant' could and should reasonably be interpreted to mean an individual who has expressed his or her desire through words or actions to be considered for the position in question." The court then explained that "we cannot say that a reasonable factual basis exists for the finding that the thirty-five candidates were all applicants. The record indicated that these names were part of a broad wish list compiled by the Committee. While one might infer that many, if not all, of these candidates had consented or sought to be considered for the position and would therefore be an applicant, the record lacks sufficient evidence to support such a determination." The court indicated that "with regard to the last three candidates who participated in interviews, we find that these individuals fall within the definition of an applicant." The court found another applicant who had withdrawn also qualified, noting that "the [trial] court could have reasonably concluded that in order to withdraw, the candidate must have previously consented or sought to have been considered for the position." LSU argued that the records were not agency records because they were compiled and maintained by Funk. The appeals court, however, pointed out that because Funk served as the university's agent the records were subject to the PRA. The appeals court also agreed that the plaintiffs were entitled to attorney's fees, but found the trial court had erred in awarding an hourly rate of $350 rather than the accepted $175. The court observed that "the plaintiffs requested an award based on the attorney general rates and introduced no evidence suggesting that the requested rate was unreasonable. We find that the [trial] court erred and that it did not have the discretion to increase the award for attorney fees. . ." (*Capital City Press, L.L.C. v. Louisiana State University System Board of Supervisors*, No. 2013 CA 2001, No 2013 CA 2000, Louisiana Court of Appeal, First Circuit, Dec. 30, 2014)

Maine

The supreme judicial court has ruled that the Town of Falmouth properly redacted information identifying the cell phone number of the former school superintendent, any personal calls she made on her government-issued cell phone, and phone numbers of any parents. Michael Doyle requested the records and after the former superintendent redacted information she considered protected, the town disclosed the redacted phone records. Doyle sued and the trial court upheld the town's decision. The supreme judicial court affirmed. The court noted that "public employees' work-issued cellular telephone numbers are exempt from the disclosure requirements of the [Freedom of Access Act under the personal contact information exemption]." The court pointed out that "records of personal telephone calls made by the former Superintendent that were unrelated to the transaction of public or government business do not fall within the definition [of a public record]. The Town and School Department did not prohibit the School Department employees who received government-issued cellular telephone from using those phones in connection with their personal matters. That the Town and School Department provided some employees with cellular telephones does not convert all of the calls made on those telephones into public records pursuant to the Act." Turning to the telephone numbers of students' parents, the court observed that "because the School Department has not given advance notice to parents that it may release parents' and students' telephone numbers, it is prohibited from doing so by federal and Maine law." (*Michael A. Doyle v. Town of Falmouth*, No. Cum. 14-227, Maine Supreme Judicial Court, Dec. 23, 2014)

The supreme judicial court has ruled that a 1953 Attorney General's investigative report is statutorily protected and cannot be released to Phillip Bowler. Bowler requested the report on the death of Sally Moran, indicating that he wanted to write a book about her disappearance and death. The Attorney General told Bowler that the disclosure of Attorney General investigative records was prohibited until 1995 by Section 200-D. That provision was repealed in 1995 as part of larger legislation bringing Attorney General investigative records under the purview of the Intelligence and Investigative Record Information Act. However, the IIRIA provided that any records that had been confidential by statute previously would remain confidential under the new statute. The supreme judicial court noted that "pursuant to the IIRIA an investigative record is

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confidential if public release would 'disclose information designated confidential by statute.' The trial court correctly concluded that section 11 [of the IIRIA] designated the Moran file as confidential' accordingly the State properly denied Bowler access to it." Bowler contended that because the Attorney General had disclosed the Moran file to Sally Moran's grandniece, Martha Wolfe, that it had waived confidentiality. Because the Attorney General had provided Wolfe the file under an exception allowing disclosure to immediate family members, Bowler argued that Wolfe was not in Moran's immediate family. But the court indicated that "the term 'immediate family member' is not defined in the IIRIA. Without attempting a comprehensive definition here, we are satisfied that the term includes the niece and grandniece of the deceased when it is likely that there are no closer surviving relatives." Rejecting Bowler's waiver claim, the court observed that "the Attorney General does not have the power to waive statutory confidentiality if the Legislature has not. We conclude that giving the file to Wolfe did not constitute a 'voluntary or intentional relinquishment' of confidentiality by the entity that created it—the Legislature." (*Phillip M. Bowler v. State of Maine*, No. KEN-14-201, Maine Supreme Judicial Court, Dec. 31, 2014)

Michigan

The supreme court has ruled that attorney's fees under the Open Meetings Act for violation of the statute are available only when the plaintiff succeeds in obtaining injunctive relief. In so ruling, the supreme court specifically overturned a series of appellate court decisions beginning with *Ridenour v. Dearborn Board of Education*, 314 N.W. 2d 760, which had interpreted the OMA to provide for fees if *any* relief was obtained. The case involved a suit brought by Kenneth Speicher alleging violations of the OMA when the Columbia Township Planning Commission failed to post proper notice of its decision to hold quarterly rather than monthly meetings. The trial court found the failure to post notice was a technical violation and did not entitle Speicher to relief. The court of appeals ruled that Speicher should have been granted declaratory relief for the posting violation but that he was not entitled to fees. But Speicher argued that under *Ridenour* a plaintiff was entitled to fees if he succeeding in getting any form of relief. On reconsideration, the court of appeals indicated it disagreed with *Ridenour* and its progeny, but found it was bound by the precedent. The supreme court, explaining that it was not bound by court of appeals precedent, decided to restore what it discerned to be the legislative intent, concluding that fees were restricted to plaintiffs that secured injunctive relief. The court noted that the provision "limits the award of attorney fees to cases in which the public body persists in violating the act, a suit is brought to enjoin such behavior, and that suit is successful in obtaining injunctive relief." Observing that its decision was meant to overturn *Ridenour*, the supreme court pointed out that "there is no allowance in the statute for obtaining the *equivalent* of relief, as sought in commencing this action. . .Because these decisions have incorrectly extended the entitlement to court costs and actual attorney fees beyond the scope articulated by the Legislature, we overrule *Ridenour* and its progeny to the extent that those cases allow for the recovery of attorney fees and costs under [the OMA] when injunctive relief was not obtained, equivalent or otherwise." (*Kenneth J. Speicher v. Columbia Township Board of Trustees*, No. 148617, Michigan Supreme Court, Dec. 22, 2014)

North Carolina

A court of appeals has ruled that the Charlotte Mecklenburg Hospital Authority must disclose a copy of the settlement agreement it reached with Wachovia Bank in connection with financial losses suffered through its investment accounts. Gary Jackson requested the settlement agreement. The hospital argued that because the Public Records Act required disclosure of settlements resulting from suits brought against an agency settlement agreements resulting from litigation filed by an agency against a third party must be exempt. Rejecting the claim, the court noted that "settlements in actions against State agencies are public records with one specific statutory exception: settlement agreements sealed by proper court order. It did not exempt other settlement agreements, and, therefore the initial bill does not support CHS' position under the

principles set out in controlling Supreme Court authority." Pointing to a recent provision requiring that settlements in excess of $75,000 were required to be made publicly available at the Legislative Library, the court observed that "the vast majority of settlement agreements involving payments to a State agency will be in actions instituted by a State agency. The fact that [the provision] requires that a copy of such settlement agreements be available at the Legislative Library is inconsistent with any reading of [the Public Records Act] that settlement documents in actions instituted by a State agency are not public records." (*Gary W. Jackson v. Charlotte Mecklenburg Hospital Authority*, No. COA13-1338, North Carolina Court of Appeals, Dec. 31, 2014)

Ohio

A court of appeals has ruled that the Bureau of Criminal Identification and Investigation properly withheld records concerning its investigation of the alleged theft of drug money from the Goshen Township Police Department under the confidential investigatory records exemption and that the *Community Journal*'s suit against BCI became moot once the agency disclosed most of the records after the investigation had concluded. After both the Goshen Township Chief of Police and the Clermont County Sheriff's Office requested the BCI investigate the alleged theft, reporter Keith BieryGolick requested all records concerning the investigation from BCI. The agency claimed all records were protected by the confidential investigation exemption and after the *Journal* filed suit, refused to respond to its discovery requests that the agency better identify the records being withheld. When the investigation concluded, BCI disclosed the records with some redactions based on other exemptions. BCI argued the case was moot and the trial court ruled in favor of the agency. The appeals court agreed that disclosure of the records protected by the confidential investigatory exemption mooted that portion of the *Journal*'s suit. The court noted that "BCI has produced the requested records, subject to redactions predicated on other claimed exemptions. In producing the records, BCI has conceded that the requested documents are no longer part of a current criminal investigation, and therefore, the exemption is no longer applicable." The court found the confidential investigatory exemption covered a broad range of records and that all the records provided by Goshen qualified. The *Journal* argued that BCI was required to disclose any records that were public records when in the custody of the Goshen Police Department. But noting that the definition of public records referred to whether records documented the functions of the agency, the court indicated that "the documents [in this case] served only to further BCI's criminal investigation of illicit activity occurring at the Police Department. Therefore, because the documents were never BCI's 'public records,' we find the documents do not fall under the ambit of the Public Records Act and do not need to be disclosed." Because the records were not BCI's public records, the *Journal* had no standing to challenge its redactions. The court observed that "BCI was not compelled to produce the records under the Public Records Act, thereby rendering any redactions of information and release of the documents to BCI's own choosing." (*Community Journal v. Erin C. Reed*, No. CA2014-01-010, Ohio Court of Appeals, Twelfth District, Clermont County, Dec. 30, 2014)

Oregon

A court of appeals has ruled that the Eugene Water & Electric Board, which provides electricity, and Seneca Sustainable Energy, a supplier of biomass electricity, have not shown that a contract between EWEB and Seneca for the purchase of electricity is completely exempt because it contains confidential business information the disclosure of which could cause competitive harm. The Register-Guard requested a copy of the contract and EWEB denied the request. EWEB and Seneca then filed suit for declaratory and injunctive relief, asking the court to find the contract was entirely exempt. The Register-Guard argued the confidential business exemption allowed an agency to protect legitimate confidential business information but that other information that did not qualify for protection had to be disclosed. The trial court found that EWEB and

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Seneca had provided sufficient justification for withholding the entire contract. The Register-Guard then appealed. The appeals court first pointed out that "read in context, [the confidential business information exemption] exempts *only* that information within a writing that satisfies both requirements (sensitivity of information and competitive disadvantage from disclosure), and a public body is required to produce any material that does not." The court explained the exemption referred to "information" four times and that the use of the word "information" clearly indicated that a document could contain some non-exempt information. The court then found that the affidavits submitted by both EWEB and Seneca were insufficient to show that everything in the contract was exempt. The court observed that Seneca's affidavit "does not establish that the contract contains *only* that kind of [sensitive] information or other information that, if disclosed, would cause a competitive disadvantage." Sending the case back to the trial court for redaction of the contract, the appeals court noted that "the contract in this case does not itself adequately convey the nature of the information within it, nor do the affidavits sufficiently describe the particular content of the document in a way that would allow a court to apply the exemption as a matter of law. Instead, EWEB's and Seneca's summary judgment motions essentially say, 'Trust us, it's exempt.' That is not how Oregon's public records law, or the summary judgment process, is intended to operate." (*John Brown, et al. v. Guard Publishing Company*, No. 161026544 and No. A149933, Oregon Court of Appeals, Dec. 17, 2014)

Texas

A court of appeals has ruled that if records fall within the attorney-client privilege they are exempt from disclosure under the Public Information Act and a public body does not need to show the Attorney General a compelling reason to withhold. The case involved a request to the City of Dallas for records pertaining to the operation of a landfill by the City. The City requested an opinion from the Attorney General as to whether certain records were protected by the attorney-client privilege, claiming that the Rules of Evidence provided a statutory basis for finding the records were exempt. The AG rejected the City's argument and found that because the City had failed to request an AG's opinion within the ten day time limit, the City was required to disclose the information or show an independent compelling reason to withhold it. Based on prior AG opinions, the AG concluded that because the attorney-client privilege could be waived it did not constitute a statutorily-based exception to disclosure. The City sued and the trial court found that although the records were privileged the City had failed to establish a compelling reason for withholding them. The appeals court, however, reversed. Noting that the AG's position was based only on prior AG opinions, the court pointed out that the supreme court, in *City of Garland v. Dallas Morning News*, 22 S.W. 3d 351 (Tex. 2000), ruled that the deliberative process privilege was statutorily-based. In a footnote, the supreme court had indicated that "the Public Information Act exempts information considered confidential by law, including information falling under the attorney-client privilege." The court further observed that in *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), the supreme court had recognized the Rules of Civil Procedure as providing independent statutory authority. The court then found that the City was not required to show an independent compelling reason to withhold the records. The court pointed out that "because the City has shown, and the AG has not contested, that the submitted information is subject to the attorney-client privilege, it therefore falls within [the exemption for statutorily-based exceptions] and is not subject to disclosure." (*Greg Abbott v. City of Dallas*, No. 03-13-00686-CV, Texas Court of Appeals, Austin, Dec. 23, 2014)

The Federal Courts…

A federal court in Colorado has ruled that information concerning the bypass procedure for randomly selecting qualifying physicians to conduct reviews of disputes of medical findings related to workers compensation benefits is protected by **Exemption 4 (confidential business information)** and **Exemption 6**

(invasion of privacy). The court also found that the Department of Labor's Office of Workers Compensation Programs was not required to produce screen shots of the bypass procedure because they did not exist. The bypass process relies on licensed software from Elsevier to randomly select physicians willing to review cases. If a physician's name is selected randomly and he or she is unable or unwilling to handle the review, the software automatically selects another physician randomly. Several claimants, believing the random process was faulty, requested records concerning the process. OWCP provided some records and redacted others and the claimants sued. The agency argued records about the process, as well as information about individual physicians, was protected by Exemption 4 because the software was proprietary. Reviewing the standards for assessing an Exemption 4 claim, Judge Raymond Moore seemed to be hesitant as to whether to apply the *Critical Mass* test or the *National Parks* test. The plaintiffs argued that the redacted names came from the OWCP software and had been obtained from a third party. But Moore agreed with the government's characterization that "through OWCP accesses the data using its own software, the data that Plaintiffs seek actually comes from a private business entity. . ." Moore noted that under *Critical Mass*, "the information sought by Plaintiffs, specifically, the names and identifiers for physicians in various contexts, would not customarily be released to the public by a private company, Elsevier. The value of a commercial database is inconsistent with the free and ready disclosure of its contents—even if restricted to District 12" [which included Colorado]. As to the *National Parks* test, Moore pointed out that "disclosure would impair the government's ability to obtain necessary information in the future. It requires little deductive reasoning to reach the conclusion that companies in the business of licensing commercial data to the government would be less likely to do so if their confidential data could be accessed by anyone simply by making a FOIA request." The plaintiffs argued that physicians' names were publicly available on the OWCP website. But Moore explained that "the public nature of the names, addresses and phone numbers of physicians does not mean that the information is not confidential when it is given in the context of documents that reveal a physician's activities, referrals, clients, etc." Moore agreed with the agency that disclosure would not shed light on government activities or operations and indicated that "the physicians and private individuals appearing in case files have a clear privacy interest in their personal and business information." While it was unclear as to whether the agency did not have the ability to provide screenshots because the requested records no longer existed or because it did not do so as part of its routine operations, Moore found the agency "will not be required to create and then produce printouts of computer screenshots as requested by Plaintiffs." (*Blake Brown, et al. v. Thomas E. Perez, Secretary of Labor*, Civil Action No. 13-01722-RM-MJW, U.S. District Court for the District of Colorado, Dec. 23, 2014)

Judge Colleen Kollar-Kotelly has ruled that the Department of Justice's Federal Criminal Discovery Manual is entirely protected by **Exemption 5 (attorney work-product privilege)**. The National Association of Criminal Defense Lawyers requested the manual, referred to as the Blue Book, from the Executive Office for U.S. Attorneys. EOUSA withheld the manual under Exemption 5 and **Exemption 7(E) (investigative methods and techniques)**. NACDL appealed and OIP affirmed the denial on the basis of Exemption 5 only. NACDL contended that the manual contained only statements of agency policy and general guidelines regarding prosecutors' disclosure obligations. DOJ, on the other hand, claimed the manual contained legal advice, strategies, and arguments for defeating discovery claims. After an *in camera* review, Kollar-Kotelly agreed with the government that the manual had been prepared in anticipation of litigation and was protected by the attorney work-product privilege. She pointed out that "the Blue Book provides background information and instructions on discovery practices and advice, strategy, and defense for litigation related to the government's discovery obligations to attorneys who will be required to litigate on the government's behalf." She observed that "the Blue Book directly relates to conduct in the adversary trial process since it provides guidelines and strategies for government prosecutors to consider in disclosing discovery and litigation against challenges to their discovery practices. The Blue Book is entirely focused on a bedrock transaction in the

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adversarial trial process—discovery." She explained that "although the Blue Book does contain general background information and agency policies regarding the government's discovery obligations, the Court finds that it contains sufficient advice and litigation strategy for use in actual litigation to qualify as attorney work-product, especially in light of the fact that the overarching purpose driving the contents and structure of the book was to prevent discovery violations and litigation arising from discovery transactions." Kollar-Kotelly rejected NACDL's contention that the Blue Book was required to be made public under subsection (a)(2) because it constituted the agency's working law. NACDL backed this claim by pointing out that DOJ intended the Blue Book to be a substitute for congressional legislation. Kollar-Kotelly noted that "simply because the DOJ decided to police discovery obligations internally instead of through passage of federal legislation does not transfer the agency's internal policing manual into agency working law. Second, even of the Blue Book contains the DOJ's working law, which, pursuant to § 552(a)(2), must proactively be disclosed, FOIA 'expressly states. . .that the disclosure obligation "does not apply" to those documents described in the nine enumerated exempted categories listed in § 552(b),' which includes Exemption 5." (*National Association of Criminal Defense Lawyers v. Executive Office for United States Attorneys*, Civil Action No. 14-269 (CKK), U.S. District Court for the District of Columbia, Dec. 18, 2014)

Judge Christopher Cooper has ruled that the Executive Office for Immigration Review, which supervises immigration judges, properly redacted personal information about the judges from 767 complaints under **Exemption 6 (invasion of privacy)** in response to a request by the American Immigration Lawyers Association. Agreeing with the agency's redactions, Cooper noted that "this is precisely the balance [between public interest and individual privacy] that EOIR has struck here: producing the nonconfidential portions of the complaint records but redacting the confidential data contained within them." AILA argued that some of the immigration judges had already been publicly identified. But Cooper pointed out that "the circuit court opinions [identifying certain immigration judges] and associated news reports involve just a small sample of IJs and complaints against them. The public availability of a smattering of complaints and the names of the limited number of individual IJs associated with them does not eliminate the privacy interests of all the remaining IJs." AILA also claimed that because IJs were entrusted to make life-changing decisions their privacy should be diminished. Cooper disagreed, noting that "the Court sees no good reason why the substantial privacy interests that IJs have in their personal information should be given any less weight than was given to the interests of the federal employees in [prior cases]. The fact that IJs are unionized, non-supervisory career civil servants selected through competitive vacancy announcements as opposed to political appointees or senior managers, further bolsters this conclusion." The agency withheld as non-responsive, information in complaint files about other complaints because those were disclosed separately. Cooper observed that "information that 'concerned other complaints against the immigration judge or other immigration judges' plainly falls within the scope of AILA's request for 'all complaints filed against immigration judges.' As a result, the Court concludes that this information is responsive to AILA's request and EOIR must release any material withheld from complaint records on that basis." Cooper rejected AILA's contention that the complaints fell within the parameters of subsection (a)(2) because they constituted final opinions requiring the agency to make them publicly available. He pointed out that "while prior substantiated complaints against an IJ may lead to progressively harsher discipline in response to subsequent complaints about him or her, they have no binding effect on the public at large or even other EOIR officials." (*American Immigration Lawyers Association v. Executive Office for Immigration Review*, Civil Action No. 13-00840 (CRC), U.S. District Court for the District of Columbia, Dec. 24, 2014)

The Fifth Circuit has ruled that the trial court did not abuse its discretion when it reduced Rafael Ellwanger DaSilva's **attorney's fees** request from $45,000 to $4,100 for his FOIA suit against U.S. Citizenship and Immigration Services for his alien file and related communications. DaSilva, a Brazilian who had entered the U.S. on a tourist visa and then married an American citizen, applied for permanent residence status. While his case was pending, he made a FOIA request to USCIS for his alien file and related

communications. DaSilva filed suit when the agency failed to respond within 20 days. The agency located 1,387 pages and disclosed the vast majority of them. However, these records responded only to his request for his alien file. Although the agency apparently thought it had completed its response to DaSilva's request, it later realized its error and produced another 1,000 pages of emails. During the litigation, DaSilva's application for permanent residency was granted by an immigration judge and he was sent a permanent residency card. DaSilva claimed he never received the card and after his counsel contacted the agency he was told to file a Form I-90 to obtain a replacement card. DaSilva amended his FOIA complaint to add a claim under the Immigration and Nationality Act and the APA for the agency's failure to provide him a PRC. That problem was solved quickly and the agency provided a new card. DaSilva then submitted a motion for attorney's fees under FOIA for $45,000, and under the Equal Access to Justice Act for $19,000 to cover the PRC litigation. The trial court rejected the EAJA claim altogether. Finding DaSilva was eligible for attorney's fees under FOIA, the trial court ruled he was not entitled to fees for the first set of disclosed documents which included his alien file, but was entitled to fees for the second set, which included the 1000 pages of emails. The trial court lowered the hourly rate requested from $295 to $200 and told DaSilva to file a revised timesheet containing only those costs related to the second set of documents. After DaSilva filed a second fees motion, the trial court awarded $4,100 in fees. DaSilva then appealed. The Fifth Circuit quickly dispensed with DaSilva' EAJA claim, noting DaSilva had misrepresented evidence that showed the agency had provided DaSilva with a PRC card. The court pointed out that "the PRC Order, on which DaSilva relies to show that he was the prevailing party, in fact instructed DaSilva to do exactly what *he* had been refusing to do and substantiated the *government's* legal position." Upholding the trial court's discretion, the Fifth Circuit indicated that filing suit immediately after 20 days "demonstrates a 'resort to the "squeaky wheel" technique of prematurely filing suit in an effort to secure preferential treatment' that the FOIA fee-shifting scheme 'was not meant to reward.'" The appeals court observed that "without any persuasive demonstration of causality, hours expended in relation to the first set of documents are excessive." Agreeing with the trial court's reductions of hours spent, the Fifth Circuit pointed out that "the district court was forced to fall back on these reductions, however, because Counsel's revised timesheet still failed to differentiate between FOIA claims and non-FOIA claims, and between hours expended in relation to the first versus the second set of documents. The district court's calculations result from Counsel's own failure to document adequately or justify his time entries, despite the court's very clear instructions to do so." (*Rafael Ellwanger DaSilva v. United States Citizenship & Immigration Services*, No. 14-30296, U.S. Court of Appeals for the Fifth Circuit, Dec. 19, 2014)

A federal court in New York has ruled that the FDA conducted an **adequate search** for records concerning its investigation of Henry Platsky's complaint related to a clinical study involving a transrectal ultrasound device in which Platsky participated as a patient. Platsky's initial complaint call to the FDA went to a staffer in the Center for Drugs, who told Platsky that he could make a FOIA request for any records concerning the study. His complaint was referred to the Center for Devices, which found an ongoing investigation of the physician involved in Platsky's study and withheld all records under **Exemption 7(A) (ongoing investigation or proceeding)**. Platsky then resubmitted his FOIA request and the agency sent him a warning letter that had resulted from the investigation. Platsky notified FDA that the warning letter pertained to a different device and was not responsive to his request. The FDA then searched for records but found nothing. After Platsky had filed suit, the agency investigated Platsky's original complaint and sent him that report. While agreeing that the agency's confusion delayed the response further, the court indicated Platsky had not shown that the agency's search was inadequate. The court noted that "the factual question raised here is whether the FDA search 'was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.' Under this standard, even if a report did exist and the FDA failed to locate it, this alone would not suffice to create a genuine issue of material fact as to the adequacy of the search." (*Henry Platsky v. Food & Drug Administration*, Civil Action No. 13-06250 (SLT)(RLM), U.S. District Court for the Eastern District of New York, Dec. 24, 2014)

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A federal court in Wisconsin has ruled that the IRS conducted an **adequate search** and properly redacted documents under various exemptions when it responded to David Stott's request for records concerning an abandoned administrative forfeiture action against him in which $7,300 in currency and $83,000 in gold, silver and platinum was seized from his residence by the IRS. The IRS ultimately decided the forfeiture letter had been sent in error and returned all the seized goods. Stott requested the forfeiture file and told the agency he was not interested in records about an investigation of him, but only about the abandoned forfeiture. The agency contacted the asset forfeiture coordinator who handled Stott's case and she searched her records and contacted several other employees with whom she had worked to search theirs. The agency produced 154 pages, withholding a 32-page sealed search warrant, the search warrant return, and several memos that had been sent to or came from the Office of Chief Counsel. Stott contended the agency had failed to search its criminal information management system for emails. But the court pointed out that the agency had several locally-based servers on which email was retained for six months. Approving of the agency's email search, the court noted that the staffer supervising the search "asked each of the employees involved in the forfeiture action to search their own emails for any they may have chose to retain in their personal archive." The court also pointed out that although Stott had an opportunity to conduct discovery he had failed to do so. Stott argued that one disputed email dealt more with trying to avoid embarrassment than it did with the forfeiture action. However, the court found the email was protected by the deliberative process privilege. The court noted that "although plaintiff suggests that the 'gist of the email' is to deflect blame and does not discuss agency policy, that is pure speculation. Any statement made [by the author of the email] about a possible alternative course of action against plaintiff would be deliberative, and the fact that he made the statement during an active criminal investigation makes it predecisional." (*David M. Stott v. Internal Revenue Service*, Civil Action No. 14-176-BBC, U.S. District Court for the Western District of Wisconsin, Dec. 22, 2014)