Volume 42, Number 10
May 11, 2016

ACCESS REPORTS FREEDOM OF INFORMATION

A Journal of News & Developments, Opinion & Analysis

In this Issue

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Access Reports is a biweekly newsletter published 24 times a year.
Subscription price is $400 per year.

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ISSN 0364-7625.

Washington Focus: James Holzer, who was appointed executive director of OGIS in August 2015 after Miriam Nisbet retired, has announced that he is resigning to return to his old job as the FOIA Officer at the Department of Homeland Security. . .Sen. Charles Grassley (R-IA) has expressed concern about reports that Secretary of Defense Ash Carter continued to use a personal email account for work even after the revelation of former Secretary of State Hillary Clinton's use of a private email server. After Carter's use of his personal email account was revealed, the Defense Department disclosed 1,336 pages of emails and attachments from Carter's personal account. In a written statement, Grassley noted that "many emails appear to contain subject matter that extends beyond mere routine administrative work. That means there were at least some sensitive information on his email.". . .Steve Aftergood of Secrecy News reports that Archivist David Ferriero has rejected a request from Sen. Dianne Feinstein (D-CA) and Sen. Patrick Leahy (D-VT) to designate the Senate torture report as a federal record requiring preservation. Ferriero cited as his reasons for denying the request ongoing FOIA litigation brought by the ACLU to force the government to disclose the report, as well as doubts about whether the report qualifies as a federal record under the Federal Records Act.

Court Finds FBI's Law Enforcement Claims Inadequate Under FOIA, But Sufficient Under PA

In the kind of case that was common 20 years ago, but has become rare today, Magistrate Judge Jacqueline Scott Corley of the Northern District of California has ruled that the FBI has not yet shown that it had a legitimate law enforcement purpose sufficient to withhold records pertaining to Dennis Raimondo, Eric Garris, and their website Antwar.com, but that the agency's law enforcement investigation of the two did not violate the Privacy Act's prohibition on collecting and maintaining information about individuals' exercise of their First Amendment rights.

Raimondo and Garris discovered in August 2011 a heavily redacted April 2004 memo indicating that they and their website had been the subject of an FBI threat assessment. They both made separate requests for records about

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themselves. The FBI responded that it could find no records. Over the next year, Raimondo and Garris clarified that they were looking for records concerning their online publication Antiwar.com. Before the agency responded, Raimondo and Garris filed suit. They also submitted a Privacy Act request asking the agency to expunge records reflecting the exercise of their First Amendment rights. The FBI denied the First Amendment-based expungement request. The two then asked the agency to expunge some information they contended was inaccurate. The agency denied that request as to Raimondo, but issued an Electronic Communication as to the information concerning Garris. Garris appealed that decision, contending the EC did not go far enough in correcting the record. In three interim responses, the FBI reviewed 290 pages, disclosing 26 pages in full and 104 pages in part. The agency withheld 117 pages in full and 43 pages were withheld as duplicates.

Corley first noted that the FBI had failed to establish that the records had a rational nexus to a legitimate law enforcement purpose. She pointed out that "the FBI's vague reference to everything from 'civil rights matters' to 'violent criminal threat, domestic terrorism investigations, international terrorism investigations, and counterintelligence investigations' does not adequately identify a law enforcement objective which justifies withholding under Exemption 7. For this reason alone, Defendants' motion for summary judgment as to Exemption 7 and the related Privacy Act violation must be denied."

She also rejected each of the agency's claims under subsections of Exemption 7. The FBI had claimed Exemption 7(A) (interference with ongoing investigation or proceeding) for the records because third party suspects might be tipped off about investigations. She pointed out, however, that "this does not explain 'how releasing each of the withheld documents would interfere with the government's *ongoing* criminal investigation.' The FBI's assertions must be sufficiently specific to allow Plaintiffs and the Court to evaluate the claimed exemption." She found the FBI's Exemption 7(C) (invasion of privacy concerning law enforcement records) claims did not outweigh the public interest articulated by the plaintiffs that "the FBI investigated them due to their political viewpoints and that information regarding the scope of the investigation will illuminate this issue. . .The FBI, however, has failed to provide sufficient information to determine whether the privacy interests outweigh the disclosure interests." She added that the FBI was asserting privacy interests for some information already in the public domain. Questioning the agency's redaction of the names of individuals who had written published articles, Corley observed that "it is unclear what privacy interest, if any, the undisclosed individual could have in protecting his or her name given that the FBI is merely noting that the individual wrote a presumably publicly available article." She also rejected the agency's attempt to withhold three-digit file numbers under Exemption 7(E) (investigative methods and techniques). She pointed out that "plaintiffs only seek the first three digits of the file numbers—the category of the offense under investigation—which further weakens the FBI's argument that disclosure would tip off suspects as to the priority of investigative interest."

The FBI submitted a supplemental *Vaughn* index, which Corley described as being eight times longer than the original index. She sympathized with the plaintiffs' claim that the supplemental index constituted "a last minute paper dump," and indicated that "it is apparent from Plaintiffs' brief that they have not had an adequate opportunity to review and comment on the adequacy of the supplemental declaration or *Vaughn* Index. Further, in denying the FBI's motion for summary judgment on the FOIA and Privacy Act disclosure claims, the Court has given the FBI guidance as to the level of specificity required. The proper remedy, then, is to have Defendant produce yet another amended *Vaughn* Index and then have the parties address the adequacy of the new Index."

Corley rejected Raimondo and Garris's claim that the threat assessment of Antiwar.com violated subsection (e)(7) of the Privacy Act prohibiting agencies from collecting and maintaining information about the exercise of individuals' First Amendment rights unless it was part of a legitimate law enforcement

investigation. Corley explained that in March 2004 an agent in the FBI's Newark Field Office had discovered a copy of the post-9/11 FBI watch list on Antiwar.com as well as a spreadsheet entitled FBI Suspect List. The Newark Office conducted a threat assessment of Antiwar.com using public sources and ultimately recommended the San Francisco Field Office conduct an investigation. The San Francisco Field Office declined to open an investigation. Raimondo and Garris argued that once the investigation was concluded, subsection (e)(7) required the agency to stop maintaining such records. Finding the FBI had not violated subsection (e)(7), Corley noted that "the broader investigation here was into how and why the spreadsheets appeared on Antiwar.com. It is difficult to conceive of how the FBI could have responsibly investigated publication of the spreadsheets without having also reviewed the postings on Antiwar.com." She added that "plaintiffs' concession that the FBI properly reviewed the postings on Antiwar.com and analyzed the watch list, but instance that the FBI erred in 'memorializing and maintaining' the document cannot be reconciled. Such a rule would place the FBI in an untenable position—agents could investigate national security concerns, but they could not document their investigation if doing so would in any way describe the exercise of an individual's First Amendment rights." She observed that there was no temporal limitation on the preservation of such records and that if such a temporal limitation were to exist, such agencies as the FBI would be inundated with requests to expunge records once an investigation was completed.

Corley found the FBI's issuance of an Electronic Communication to field offices explaining that allegations that Garris had threatened to hack the FBI were incorrect provided Garris with more than a sufficient remedy. She indicated that "the EC is more accurate than what Garris seeks because it describes the FBI's error in the first instance—in other words, it corrects history rather than erases it completely." (*Dennis Joseph Raimondo, et al. v. Federal Bureau of Investigation*, Civil Action No. 13-02295-JSC, U.S. District Court for the Northern District of California, May 10)

Views from the States…

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

Arkansas

The supreme court has ruled that the federal Drivers Privacy Protection Act does not require personal information to be redacted from publicly available accident reports. The case involved a request by Daniel Wren, an attorney trying to solicit clients, to the State Police for accident reports. The State Police routinely redacted personal information from such reports, citing the DPPA. When Wren sued, the trial court found the records were public and not subject to the DPPA. Agreeing with the trial court, the supreme court noted that "it is clear that a vehicle-accident report is not included in the definition of 'motor vehicle record' [in the DPPA], regardless of whether, as a matter of convenience, some of the information included in an accident report may be taken from or verified by a database maintained by the Office of Motor Vehicles. Furthermore, Congress specifically provided that 'personal information' does not include information on vehicular accidents. Because the DPPA does not prohibit information contained in accident reports from being released under FOIA, we affirm the ruling of the [trial] court." (*Arkansas State Police v. Daniel E. Wren*, No. CV-15-828, Arkansas Supreme Court, April 28)

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Kentucky

A court of appeals has ruled that the Danville Board of Commissioners violated the Open Meetings Act when it went into closed session to discuss the purchase of a building and agreed both to purchase the building and to hire a contractor to act on its behalf in the purchase. The Board purchased the building at auction and then held a public meeting at which it discussed the purchase. Although the city manager provided an explanation of the Board's actions to local media, the *Advocate-Messenger* complained that the closed sessions violated the OMA. The trial court agreed, but found the *Advocate-Messenger* was not entitled to fees and penalties. The appellate court found that the Board's actions went well beyond the exception for closed meetings to discuss the purchase of real property. The court noted that the exception "prohibits performance of the actual final action which results from the deliberation—in this case, voting on the approval of bidding on the property. The final action must be carried out in a public meeting." The court also faulted the Board for its decision made in the closed session to hire a contractor. The court observed that "as a result of the closed session, and without any public discussion, the city did hire a bidding agent who represented the city and ultimately submitted the winning bid at the auction." Sending the case back to the trial court to award the *Advocate-Messenger* fees and penalties, the court pointed out that "the Board deliberately elected to ignore the requirements of the Open Meetings Act when it proceeded to discuss public business in private. . . Its conduct with respect to the clear requirements of the statute was unquestionably willful. . .Therefore, the trial court erred when it denied the *Advocate-Messenger*'s motion for fees and penalties." (*Board of Commissioners of the City of Danville v. Advocate Communications*, No. 2014-CA-001300-MR and No. 2014-CA-001301-MR, Kentucky Court of Appeals, April 29)

New York

A court of appeals has ruled that the New York City Police Department provided sufficient evidence to show that disclosure of records pertaining to its use of a Z-backscatter van, which uses X-ray technology that bounces back from an object to create an image, resulting in some level of exposure to low doses of ionizing radiation, would allow terrorists to gain insights on the way the vehicles were used. The appeals court reversed the trial court's finding that the records were not protected by the law enforcement exemption, accepting instead the Police Department's affidavit explaining that 'releasing information describing the strategies, operational tactics, uses and numbers of the van would undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack." However, the court agreed with the trial court that the police were required to disclose information about the health and safety information about the van's radiation exposure. The court noted that "release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety." The trial court had ruled that the plaintiff was entitled to attorney's fees, but the appellate court indicated that "in light of our significant modification of [the trial court's] order, petitioner has not 'substantially prevailed' and thus there is no basis for an award of attorney's fees and other litigation costs." (*In re: Michael Grabell v. New York City Police Department*, No. 504N, 100580/13, New York Supreme Court, Appellate Division, First Department, May 10)

Ohio

The supreme court has ruled that emails sent to and from members of the Olentangy Local School District Board of Education pertaining to a response to an editorial in the Columbus *Dispatch* criticizing the Board's decision to change its policy to require that all communications between board members and school staff first pass through the district superintendent or district treasurer that resulted in a letter to the editor signed by the majority of board members rebutting the newspaper's criticisms constituted a public meeting in violation of the Open Meetings Act. Adam White, a board member, conducted an independent investigation

of allegations of improper expenditures by two athletic directors, which resulted in the resignation of one of them and reimbursement to the district by both of them. In an attempt to restrict such independent investigations, the board revised its communications policy, resulting in the critical editorial. David King, the board president, enlisted the rest of the board members, as well as the superintendent and several school staff members, to draft a letter to the editor rebutting the criticisms. The process was conducted through a series of email exchanges, resulting in a draft letter, and a final response that was submitted to and published by the newspaper. White then brought suit, claiming the action violated the Open Meetings Act. The trial court found the exchange did not meet the statutory definition of a public meeting. The trial court's decision was upheld on appeal. But the majority of the supreme court found the email exchange was a meeting and allowed White to continue with his suit. The majority noted that the supreme court had previously found a series of in-person meetings of less than a quorum constituted a meeting. Applying that holding here, the court observed that "the distinction between serial in-person communications and serial electronic communications via email is a distinction without a difference because discussions of public bodies are to be conducted in a public forum, and thus, we conclude that in this instance, a prearranged discussion of public business of a public body by a majority of its members through a series of private e-mail communications is subject to [the statute]." The court pointed out that "subsequently, a majority of the board members voted to ratify the board's response at a public meeting, further indicating that the response fell within the purview of the board's duties, functions, and jurisdiction under the Open Meetings Act, when a board of education formally votes to ratify a prior action, the ratified action constitutes 'public business' under the statute." (*Adam White v. David King, et al.*, No. 2014-1796, Ohio Supreme Court, May 3)

Oregon

A court of appeals has ruled that tort claims filed against the Oregon Health and Science University are not protected by the federal HIPAA, but may be exempt under a separate state provision. The court also found that several tort claims involving students working at the hospital could be subject to the federal FERPA if they involved student activities or status, which was not clear from the record. *The Oregonian* requested the records under the Public Records Law. OHSU provided a list of the eight tort claims filed during the time period requested by the newspaper and then proceeded to explain why most of the information was protected. OHSU filed suit asking for a declaratory judgment finding the records were exempt. Instead, the trial court found the records were not protected and granted *The Oregonian* attorney's fees. The appeals court found that while the privacy rule in HIPAA did not protect the medial claims, a separate state statute which included an exemption for patient information might apply. Rejecting OHSU's contention that HIPAA applied, the appeals court noted that "we reject OHSU's assertion that 'federal law' refers only to the disclosure limitations in the Privacy Rule and does not include the disclosure allowances in that same rule. The obvious meaning of 'federal law' is the entire law; the entire operation of the Privacy Rule excuses nondisclosure limitations if the disclosure is 'required by' a state law" like the Public Records Law. Turning to the state law providing exemptions for certain categories of records, the appellate court pointed out that "application of [the statute] necessarily requires examination of the actual 'information about the physical or mental health or psychiatric care or treatment of a living individual that is contained in the public record to determine whether the exemption applies, and then consideration of whether the public disclosure thereof would constitute an unreasonable invasion of privacy.' Thus, the [trial] court erred in granting *The Oregonian*'s motion for summary judgment on the patient health information without a sufficient record to determine the application of [the statute] to public records containing that information." OHSU contended that a tort claim against a faculty member was part of that faculty member's personnel file. The court observed that "the summary judgment record does not show that the faculty member tort claim notice is actually 'in the personnel file' of the affected faculty member. Instead, the record shows that the tort claim notices are regularly kept by claims managers in OHSH's risk management department." Turning to tort claims involving students, the court

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indicated that 'we conclude that a student tort claim notice is not an 'education record' if it is not 'directly related to a student['s]' activities or status as a student. We remand to the reviewing court to determine whether it describes and directly relates to activities of a student or the educational status of a student. If it does, then the record may be exempt from disclosure [under the Public Records Law]." (*Oregon Health and Science University v. Oregonian Publishing Company*. No. A152961, Oregon Court of Appeals, May 11)

Wisconsin

A court of appeals has ruled that the federal Drivers Privacy Protection Act does not prohibit the City of New Richmond from disclosing accident reports containing information that came from or was verified by using DMV data because an exception to the DPPA allows disclosure where permitted by state law. The court also found that the "agency functions" exception in the DPPA did not encompass a public body's obligation to respond to a public records request, but that because the record before the court was unclear as to whether the New Richmond police department used the DMV-generated data appearing in incident reports for some other legitimate function that would permit disclosure, and because it was still unclear whether the police department had obtained the data directly from the DMV, the court remanded the case back to the trial court for further proceedings. The New Richmond News had requested two accident reports and one incident report from the New Richmond police department. The police department disclosed heavily redacted versions of the reports, indicating that the DPPA prohibited it from disclosing driver license information. The newspaper sued and the trial court found that the DPPA did not prohibit disclosure of any of the information because it fell within exceptions to the DPPA. At the court of appeals, the court agreed that a provision in the public records law requiring that accident reports be public provided the state law exception to the DPPA. The court noted that the public records law "is a specific state statute permitting [disclosure of accident reports]." The court added that "no more is required for the disclosure to be permissible under [the state law exception]." The court rejected the newspaper's argument that disclosure of the incident reports fell under the exception for a state function, which in this case was the police department's obligation to respond to public records requests. The court observed that "permitting the DMV to disclose personal information every time a public records request was made would eviscerate the protection provided by the DPPA, which was enacted to limit the circumstances in which state DMVs could disclose drivers' personal information in order to protect their safety and privacy." The court indicated that "we question whether disclosure of the incident report requested by the Newspaper serves any of the police department's other functions, beyond mere compliance with the public records law. If so, disclosure of the unredacted incident report may nevertheless have been permissible under [the state function exception]. We therefore remand to the [trial] court for the parties to present evidence and argument regarding that issue." The court also pointed out that the question of whether the identifying information actually came from DMV records was still unsettled. The court noted that "whether the redacted information was obtained from, or merely verified using, DMV records is a question of fact. The [trial] court made no factual findings on this issue. Accordingly, on remand, we direct the court, as a threshold matter, to determine whether the redacted information in the incident report was obtained from DMV records or, if initially obtained from another source, was substantively altered upon verification to conform to information in the DMV records." (*New Richmond News and Steven Dzubay v. City of New Richmond*, No. 2014AP1938, Wisconsin Court of appeals, District III, May 10)

The Federal Courts…

Judge Emmet Sullivan has explained his reasons for granting Judicial Watch limited **discovery** in its case against the Department of State for records concerning Huma Abedin, a top aide to former Secretary of State Hillary Clinton. Judicial Watch requested records concerning Abedin's employment status at State and

why she was given permission to hold outside employment while also being employed by State. The agency searched several offices, focusing on the Bureau of Human Resources, and came up with eight records that were disclosed to Judicial Watch. The parties agreed to dismiss the case, but after the existence of Clinton's emails came to light, the case was reopened. A second search found approximately 50 pages. The State Department filed for summary judgment, but Judicial Watch requested limited discovery, arguing that there were still unanswered questions about the adequacy of the agency's search. During this time, it became clear that FOIA staff were not aware of the existence of emails from Clinton and her staff. Assessing Judicial Watch's discovery request, Sullivan noted that State claimed the Supreme Court's decision in *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980), in which the Court found that Kissinger's records from when he was National Security Advisor, which he had stored at State later while he was Secretary of State and then removed unilaterally, giving the records ultimately to the Library of Congress with access restrictions, showed that the agency was not responsible for records that it did not control. Sullivan rejected the claim, indicating that *Kissinger* was not on point. He pointed out that "here, Judicial Watch alleges that the State Department and Mrs. Clinton sought to 'deliberately thwart FOIA' through the creation and use of clintonemail.com . This allegation goes directly to the type of circumstance *Kissinger* did not address." The agency also argued that another district court judge had found that the State Department had not violated the Federal Records Act in its treatment of Clinton's emails. But Sullivan found this case also was not on point. He noted that "the relevant standards under the FRA and FOIA are different. Under the FRA, a plaintiff's right to compel referral to the Attorney General is limited to situations where an agency has taken either minimal or no action to remedy the removal or destruction of federal records. Although the State Department has taken some action to recover federal records related to this case, those efforts do not resolve the question of whether the agency's search in response to Judicial Watch's FOIA request was reasonable. As Judge Lamberth recently observed 'the State Department's willingness to now search documents voluntarily turned over to the Department by Secretary Clinton and other officials hardly transforms such a search into an "adequate" or "reasonable" one.'" Sullivan allowed Judicial Watch to take discovery and to depose certain individuals, but limited the discovery to questions relevant to the processing of its FOIA request. (*Judicial Watch v. U.S. Department of State*, Civil Action No. 13-1363, U.S. District Court for the District of Columbia, May 4)

Noting that **discovery** is considered rare in FOIA cases, Judge Amit Mehta has granted limited discovery to the Competitive Enterprise Institute in its FOIA litigation against the Office of Science and Technology Policy because the agency's claims that it had found all draft copies of an OSTP letter denying CEI's request that the agency remove a blog post on its website supporting the existence of climate change under the Information Quality Act had already been proven incorrect on three occasions. The agency's denial letter was a legal analysis of the agency's obligations under the Information Quality Act. In responding to CEI's FOIA request, the agency located 47 draft pages, which it claimed represented all existing drafts, which it withheld under **Exemption 5 (privileges)**. But after CEI filed suit, the agency discovered another draft that John Holdren, the head of OSTP, had sent to Jennifer Francis, a professor at Rutgers University, which was in the form of a literature review rather than a legal analysis. Mehta had previously ruled that the Francis draft was not privileged because it was shared with an outside party. In responding to Mehta's order to disclose the Francis draft, the agency discovered two more drafts Holdren had sent, one to another academic, and one to the Senior Science Analyst at the agency. Mehta learned from public sources that the agency had disclosed the two further drafts to CEI, at which time he ordered the agency to show cause why he should not reconsider granting discovery. After searching Holdren's email account and work computer documents, the agency found 10 drafts similar to those sent to Francis. By this time, Mehta apparently had had enough. He noted that "Defendant's representations that it conducted a reasonable search designed to locate *all* relevant documents has proven to be inaccurate time and again. Although Defendant has candidly acknowledged and apologized for the flaws in its search efforts, which the court appreciates, those expressions of regret come too late." The

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agency argued that FOIA searches were not required to be either perfect or exhaustive. Mehta observed that "the court does not take issue with those statements. But at some point the government's inconsistent representations about the scope and completeness of its searches must give way to the truth-seeking function of the adversarial process, including the tools available through discovery. This case has crossed that threshold." (*Competitive Enterprise Institute v. Office of Science and Policy Technology*, Civil Action No. 14-01806 (APM), U.S. District Court for the District of Columbia, May 9)

The Sixth Circuit has ruled that Jon Rogers waived his right to bring a FOIA suit against the IRS when he settled forfeiture claims against him. However, in a concurrence/dissent, Circuit Court Judge Eric Clay argued that the court should have provided more analysis of Rogers' waiver claim and that, further, the majority's acceptance of the district court's finding that the IRS was not estopped from bringing the waiver argument up more than a year after Rogers filed suit was inappropriate. The agency had seized millions of dollars from Rogers and two business associates after a criminal investigation. The agency then initiated four forfeiture actions. The forfeiture claims, settled in August 2012, included a release clause where Rogers agreed not to bring future claims "related to and/or in connection with or arising out of" the forfeiture actions. Four months later, Rogers made a FOIA request and after the agency denied his request he filed suit. The agency agreed to a rolling production of records, but a year later the agency filed its summary judgment motion contending Rogers' FOIA suit was prohibited by the release terms of the settlement agreement. The district court sided with the government and rejected Rogers' claim that the IRS should be estopped from asserting the defense because of the time delay. The Sixth Circuit majority upheld the district court's decision. The majority noted that "although the IRS waited over a year to assert the defense, the delay does not appear to have prejudiced Rogers, since he received documents he was seeking during the rolling production process." Pointing out that Rogers was a sophisticated party, the majority added that "Rogers should have anticipated that the IRS would raise the defense of waiver by release. And, Rogers had actual notice when the IRS raised the defense in its motion for summary judgment, and he was afforded ample opportunity to respond to it." In his concurrence/dissent, Clay noted that the issue of waiver of FOIA claims through a settlement agreement had rarely been litigated. He found a single D.C. Circuit district court decision, *PEER v. EPA*, 926 F. Supp. 2d 48 (D.D.C. 2013), in which the court had also ruled that the plaintiff's sophistication should have put him on notice that the government would argue that the plaintiff's settlement agreement waived his right to bring a further claim. Clay observed that analysis applied in this case as well. But he rejected the majority's holding that Rogers was not prejudiced by the agency's failure to raise the waiver claim until 15 months later. He noted that "not once in the 461 days between receiving Rogers' complaint and filing its motion for summary judgment did the IRS even mention the release." He added that "the district court should have never allowed the IRS to plead this defense when it did. That decision was an abuse of discretion and should be reversed." (*Jon R. Rogers v. Internal Revenue Service*, No. 15-3409, U.S. Court of Appeals for the Sixth Circuit, May 4)

A federal court in New York has ruled that the *New York Times* is not entitled to **discovery** concerning the Treasury Department's reasons for withholding a memo concerning whether or not the Office of Foreign Assets Control was required to provide notice to individuals or groups listed as foreign terrorists when it relied on warrantless surveillance as the basis for the designation. In response to reporter Charlie Savage's FOIA request, OFAC located a 13-page memo, which it withheld under **Exemption 5 (privileges)**. Savage argued the memo constituted the working law of the agency and must be disclosed. At this stage of the litigation, however, the *Times* asked for discovery to explore what it considered inconsistencies in the agency's affidavits concerning whether or not the memo was actually responsive to Savage's request. Judge Edgardo Ramos indicated that "this issue is surely material. If the record showed that the explanation in [the affidavit submitted by the general counsel's office] was not Treasury's actual contemporaneous reasoning, it could

suggest that Treasury originally determined that the Memo contained 'governing legal protocol' and thus the agency's working law, potentially providing a basis for the Court to order disclosure." But Ramos noted that "what is less clear is whether this material issue is actually *in dispute* based on the current state of the record." He pointed out that the general counsel's affidavit and the affidavit from the FOIA officer confirmed that "it was in fact [the general counsel's office that] made the original responsiveness determination. Nothing in these two declarations suggests that two different responsiveness determinations were made, one at the time the Request was submitted and another in this litigation. The Times, therefore, is not really identifying a contradiction or inconsistency, so much as it is asking the Court to infer bad faith from the fact that [the FOIA Officer's affidavit] did not explicate the reasoning later provided in the [general counsel's office affidavit]. This provides only a weak inference of bad faith, at best, and thus the Court declines to order depositions on that basis." But Ramos agreed with the *Times* that the FOIA Officer's affidavit was not specific enough and left a gap in the factual record. Ramos ordered the FOIA Officer to provide an additional affidavit "describing the specific factual basis that *he* relied upon to deem the Memo responsive, including but not limited to facts provided to him by [the general counsel's office] in its recommendation." (*New York Times Company and Charlie Savage v. United States Department of the Treasury*, Civil Action No. 15-5740 (ER), U.S. District Court for the Southern District of New York, April 26)

A federal court in California has ruled that the Department of Justice has failed to show why information concerning confidential informant Gordon Skinner, who testified in public at William Pickard's trial, should continue to be withheld. Pickard had previously persuaded the Ninth Circuit that Skinner's identity as a confidential source had been publicly acknowledged by his testimony and that the government could no longer claim that information identifying him fell within an exclusion to FOIA. Since then, Pickard has been trying to force the Department of Justice to disclose publicly known information about Skinner. The district court found that records identifying Skinner as a confidential informant and pertaining to his public testimony at Pickard's trial should be disclosed, but provided a further opportunity for the agency to make its case. The agency claimed broadly that disclosure of information concerning a confidential source would be harmful. Finding this insufficient, the court noted that "the government's brief responding to the Court's tentative order is not sufficiently tailored to the case at hand. Because the government did not provide reasons tailored to this case not to release the documents, the Court's tentative view remains unchanged." The court ordered the agency to release Skinner's name, information he voluntarily disclosed to the public, and his NADDIS number. The court indicated, however, that "the government may redact any part of the 325 documents that is not responsive to this order." (*William Leonard Pickard v. Department of Justice*, Civil Action No. 06-00185 CRB, U.S. District Court for the Northern District of California, May 2)

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